No. 78-1737

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

JOHN P. FOLEY, JR., JACK FOLEY REALTY, INC., COLQUITT-CARRUTHERS, INC. and JOHN T. CARRUTHERS, JR., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RICHARD A. HIBEY
SURREY, KARASIK AND MORSE
1156 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 331-4000

and

WILLIAM W. CAHILL, JR.
WEINBERG AND GREEN
10 Light Street
Baltimore, Maryland 21202
(301) 332-8600

Attorneys for Petitioners Colquitt-Carruthers, Inc. and John T. Carruthers, Jr.

and

JOHN H. LEWIN, JR.
VENABLE, BAETJER AND HOWARD
1800 Mercantile Bank & Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201
(301) 752-6780

Attorney for Petitioners John P. Foley, Jr. and Jack Foley Realty, Inc.

Of Counsel:

ROBERT J. MCMANUS
SURREY, KARASIK AND MORSE

Attorney for Petitioners Colquitt-Carruthers, Inc. and John T. Carruthers, Jr.

and

JAMES K. ARCHIBALD
VENABLE, BAETJER AND HOWARD

Attorney for Petitioners John P. Foley, Jr. and Jack Foley Realty, Inc.

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No.

JOHN P. FOLEY, JR., JACK FOLEY REALTY, INC., COLQUITT-CARRUTHERS, INC. and JOHN T. CARRUTHERS, JR., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

This petition is filed pursuant to Rule 21 of the Rules of this Court for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, to review the judgment of that Court in *United States* v. *John P. Foley, Jr., and Jack Foley Realty, Inc.,* and *United States* v. *Colquitt-Carruthers, Inc., and John T. Carruthers, Jr.,* Nos. 78-5013 and 78-5015 (April 19, 1979).[1]

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[1] Three of the remaining co-defendants, Bogley, Inc. and its President, Robert W. Lebling, and Shannon & Luchs Company, have petitioned the Fourth Circuit for rehearing and filed sug-

OPINIONS BELOW

The Court of Appeals entered judgment in this case on April 19, 1979. The Court of Appeals' opinion is attached hereto as Exhibit A. The trial court's memorandum and order denying defendants' motion to dismiss, *United States* v. *Jack Foley Realty, Inc.*, 1977-2 TRADE CASES ¶ 61,678 (D. Md. 1977), is attached hereto as Exhibit B.

JURISDICTION

The judgment of the Court of Appeals was entered on April 19, 1979. Upon motion of petitioners, the mandate of the Court of Appeals was stayed May 11, 1979, in order to permit this petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the "commerce clause", Art. I, § 8, of the Constitution permit the application of § 1 of the Sherman Act, 15 U.S.C. § 1, to an alleged conspiracy to fix or maintain real estate commission rates paid by sellers of used residential real property located solely in Montgomery County, Maryland?

2. Did the trial court's instructions to the jury on the degree of criminal intent required for conviction satisfy the due process clause of the fifth amendment to the Constitution, as it applies to a felony charge under § 1 of the Sherman Act?

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gestions for rehearing *en banc*. Defendants Robert L. Gruen, Inc. and Schick & Pepe Realty, Inc. have moved to stay the mandate of the Fourth Circuit pending application to this Court for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

U.S. CONST., Art. I, § 8, cl. 3:

> [The Congress shall have Power] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]

U.S. CONST., amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Following their indictment on April 1, 1977 for conspiring to fix and maintain the real estate commission rates applicable to sales of used residential property in Montgomery County, Marvland, in violation of the Sherman Act, petitioners and their co-defendants all moved to dismiss for lack of federal subject matter jurisdiction. (The indictment is attached hereto as Exhibit C.) Their motions were denied. *United States* v. *Jack Foley Realty, Inc., supra,* 1977-2 TRADE CASES ¶ 61,678. Thereafter, all defendants were found guilty, on September 28, 1977, after a jury trial in the United States District Court for the District of Maryland. Judgment was entered November 7, 1977.

The indictment alleged that, from September, 1974, to the return of the indictment, petitioners and their co-defendants entered into a conspiracy to fix commission rates at 7%, a one percent increase over the previously prevailing rate of 6%. At the trial, the government adduced evidence to show that all the defendants attended, or were represented at, a dinner at the Congressional Country Club in Montgomery County on September 5, 1974, held at the invitation of petitioner John P. Foley, Jr., the incoming President of the Montgomery County Board of Realtors. At the dinner, Foley made some brief after-dinner remarks, including an expression of his decision to raise the commission rate charged by his company to 7%. After Foley sat down, there was a period of discussion of commission rates, although the record reveals no further comments by Foley. With respect to Carruthers' reaction at the dinner, the record is unclear. Two government witnesses testified that he stated that he was "already

at 7%", but another testified that he stated he "would be going" to 7%.

Carruthers' accountant testified that, prior to the September 5 dinner, he had advised Carruthers to raise his firm's prevailing commission rate. The record also shows that Colquitt-Carruthers, Inc. had accepted a number of 7% listings well before September 5, 1974, but that it thereafter established a written policy of accepting listings only at 7% or above.

The record also indicates that Carruthers made several phone calls to other Montgomery County realtors in late 1974 or early 1975 to ask or complain about their current commission rate practices.

The interstate commerce nexus. The indictment related only to sales of Montgomery County realty, and all defendants were licensed realtors in that county. Montgomery County is contiguous to the District of Columbia. Petitioners Colquitt-Carruthers, Inc. and Jack Foley Realty, Inc. stipulated at the trial that, in 1974 and 1975, their expenditures for advertising in *The Washington Post* and *The Washington Star* were, respectively, "substantial" and "not insubstantial".

The record also revealed that many out-of-state customers purchased houses in Montgomery County; that some houses purchased through the defendants were financed by lending institutions headquartered outside the state; and that some purchasers placed title and other insurance with insurers located outside the state.

The instructions to the jury. In his instructions to the jury, the trial judge included the following material:

However, before you find that a Defendant became a member of the conspiracy charged, the evidence must show beyond a reasonable doubt that the conspiracy was knowingly formed and that the Defendant knowingly participated in the unlawful plan with the intent to further or advance some object or purpose of the conspiracy.

This latter requirement is satisfied if the evidence shows beyond a reasonable doubt a knowing assistance of any kind in effectuating the objective of the conspiracy.

. . . .

. . . A defendant may be found guilty of a conspiracy only if the Defendant understood that he had joined the single overall conspiracy that is charged. If any Defendant was not a party to that overall agreement or conspiracy, you must find that Defendant not guilty even if he participated in isolated or subsidiary actions or events which aided the ends of the conspiracy.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeal Concerning The Scope Of § 1 Of The Sherman Act As It Applies To The Activities Of Real Estate Brokers.

This case squarely presents the vexing issue of whether the activities of local real estate brokers are subject to the criminal strictures of the Sherman Act, a question on which the court below concluded that precedent was "in hopeless disarray", slip op. at p. 6. *Compare, e.g., McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 583 F.2d 1315 (5th Cir. 1978), *cert. granted,* —— U.S.L.W. —— (May 11, 1979) (No. 78-1501); *Bryan* v. *Stillwater Bd. of Realtors,* 578 F.2d 1319 (10th Cir. 1977); *Diversified Brokerage Services, Inc.* v. *Greater Des Moines Bd. of Realtors,* 521 F.2d 1343

(8th Cir. 1975); *Cotillion Club, Inc.* v. *Detroit Real Estate Bd.,* 303 F.Supp 850 (E.D. Mich. 1964); *Marston* v. *Ann Arbor Property Man. Ass'n,* 302 F.Supp. 1276 (E.D. Mich. 1969), *aff'd,* 422 F.2d 836 (6th Cir. 1970), *with, e.g., Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975); *Gateway Assoc., Inc.* v. *Essex-Costello, Inc.,* 380 F.Supp. 1089 (N.D. Ill. 1974); *United States* v. *Atlanta Real Estate Bd.,* 1972 TRADE CASES ¶ 73,825 (N.D. Ga. 1971). Faced with what it termed such "disarray", the court below concluded:

> that the guiding legal principles must be sought at a more general level than any keyed to the particular nature of the real estate brokerage business, and that detailed efforts to reconcile the disparate results in particular real estate brokerage cases are likely to be bootless.

Slip. op. at p. 7. Petitioners respectfully suggest that the bootlessness to which the court below alluded should be eliminated, by the granting of the instant petition. In addition, this Court may wish to address the slightly different fact situation presented by the case at bar when it renders a decision in *McLain, supra.* Although the factors to which the court below looked may have been relevant, petitioners further suggest that the sort of analysis which that court felt compelled to undertake is unnecessary, confusing and likely to lead, as it has already, to divergent results in substantially similar cases. For example, in *McLain* v. *Real Estate Bd. of New Orleans, Inc., supra,* the Fifth Circuit, in finding a lack of federal jurisdiction over the activities of real estate brokers in New Orleans, stated:

> Here we are not considering pleadings that allege price fixing in appreciable sales of realty to out-of-state buyers. That might be a different matter. In-

> stead, this complaint asserts only that some individuals victimized by the defendants are persons moving in and out of the New Orleans area. . . .

583 F.2d at 1319 (footnote omitted). The petitioners find the distinction contemplated by the Fifth Circuit somewhat difficult to grasp.[2] Indeed, that court itself indicated it was unclear whether the distinction would make a difference: the footnote attached to the above quotation stated:

> 2. Some courts have held sufficient allegations that the defendants advertised in interstate newspapers and that they sold realty to a substantial number of purchasers situated out-of-state. *See, e.g., United States* v. *Jack Foley Realty, Inc.* [citation omitted]. We suggest no view as to whether the addition of allegations like these would bring the defendants within the bounds of the Sherman Act.

Id. In view of the Fifth Circuit's own reference to the instant case, and in further view of the dubiousness of the distinction between it and *McLain,* petitioners contend that a conflict exists between the circuits that have considered the issue presented by this petition.

Petitioners further contend that the "guiding legal principles" to which the court below looked were erroneously applied in this case. As the court correctly stated:

> The traditional mode of analysis seeks the requisite nexus along one or both of two general lines of inquiry unrelated in terms to particular categories of commercial activities. One inquires whether the activities alleged to be under illegal restraint lie directly in the flow of interstate commerce; the other, whether though intrastate in nature, they nevertheless have so great an impact on interstate commerce that they substantially affect it.

[2] Unless it be based on the highly theoretical notion that none of the customers in *McLain* moved in or out of the State of Louisiana. If any did, then the distinction apparently contemplated becomes even more difficult to apply, requiring a judgment in each case as to whether the percentage of sellers or buyers who are in the process of relocating across a state line is "enough".

Slip. op. at 7. It is clear, however, that the alleged price fixing in this case was not of the "in-commerce" variety:

> [T]he cases uniformly hold that the mere movement of individuals from one state to another in order to utilize particular services does not transform those services into interstate services within the meaning of the Sherman Act.

Diversified Brokerage Services v. *Greater Des Moines Bd. of Realtors, supra,* 521 F.2d at 1346. Moreover, it should be stressed that the individuals who pay real estate commissions are *sellers,* not buyers. The sellers, of course, do not even move "from one state to another in order to utilize particular services".

If, then, the Sherman Act was applicable to the activities alleged in the indictment, it must be because those activities "substantially affect" interstate commerce. The court below appears to have concluded that the rationale of *Goldfarb* v. *Virginia State Bar, supra,* required a conclusion that the "substantial effect" test was met in this case. Petitioners disagree. In *Goldfarb,* this Court held that the prohibitions of § 1 of the Sherman Act covered a price fixing scheme whereby the charges by Virginia attorneys for searching titles to Virginia realty were fixed. In so holding, the Court expressly relied on the fact that loan guarantees by federal agencies and title insurance policies written by

out-of-state insurance companies required the title searches in question: by law, moreover, such title searches were required to be conducted by Virginia lawyers. This Court therefore concluded that:

> Where, as a matter of law or practical necessity, legal services are an integral part of an interstate transaction, a restraint on those services may substantially affect commerce for Sherman Act purposes.

421 U.S. at 785. In the instant case, the court below relied on the fact that some of the defendants advertised in "out-of-state media";[3] that a "considerable amount" of financing for brokered purchases came from out of state; and, that "substantial numbers" of the home mortgages were guaranteed by federal agencies headquartered in the District of Columbia, slip op. at pp. 11-12. Thus fortified, the court below concluded that the defendants' activities were an "integral part" of interstate commerce within the meaning of *Goldfarb*, slip op. at p. 12, and were therefore subject to the Sherman Act.

The factors stressed by the court below in forcing the instant case into the *Goldfarb* mold are totally irrelevant to proper analysis. As noted above, it was the *sellers* who paid the commissions whose rates were allegedly fixed by the defendants in this case. No *sellers* were attracted by advertising outside Maryland. No

[3] The court referred to Washington, D. C. newspapers and radio stations. Although petitioners contend that this fact is irrelevant, they note that the "local" papers and radio stations in Montgomery County are mostly located out-of-state. The fortuity that particular defendants are doing business near a state border should not affect the finding as to whether local realtors' activities are subject to the Sherman Act. If the Sherman Act applies to realtors in New York City, it should also apply to those in Syracuse.

sellers placed home mortgages on the property in question, or obtained title insurance. No *sellers* had repayment of their loans guaranteed by federal agencies outside Maryland. No matter where the activities of the *buyers* occurred, it cannot alter the irrefutable fact that the only commerce at issue in this case is the commerce between the realtors and the sellers—commerce that occurred wholly within Maryland, between Maryland residents, respecting Maryland realty.

After failing to focus on the essential intrastate nature of the commerce at issue, the court below went on to make two erroneous assumptions. First, it assumed without discussion that the converse of *Goldfarb* is true: that, if an activity (*i.e.*, the sale of realty) is frequently followed by an interstate transaction (*i.e.*, a mortgage loan), then the interstate character of the latter attaches to the former. Second, it assumed that the activities complained of were "integral" within the meaning of *Goldfarb* to the interstate transactions.

But the converse of *Goldfarb* should not be true, and neither *Goldfarb* nor any other decision of which petitioners are aware holds it to be true. If it were, then any transaction, no matter how local, would become an interstate transaction solely by virtue of what the parties to the transaction may do later.

In *McLain* v. *Real Estate Bd. of New Orleans, supra,* currently pending before this Court on certiorari, the Fifth Circuit rejected the reasoning adopted by the court below, on the basis of a distinction between "incidental" and "integral" functions of the activities sought to be included in the sweep of the Sherman Act, relying largely on *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947). *See* 583 F.2d at 1322. Petitioners wish to stress that the distinction between "integral"

and "incidental", which may turn out to be difficult to apply in practice, is scarcely the sole avaliable basis for decision in the case at bar. There is another and better argument to distinguish the instant case from *Goldfarb*. In *Goldfarb*, the allegedly unlawful practices were undertaken on a local level because they were necessitated by interstate transactions (*i.e.*, the writing of title insurance policies and mortgage loan guarantees by out-of-state entities). In the case at bar, the local activities (unlike those in *Goldfarb*) did not take place because an interstate transaction required them; rather, the interstate transactions in question took place because of (but were certainly not *required* by) the local activity of selling real estate.

Finally, petitioners wish to note that this Court's holding in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), cited as support by the court below, slip op. at p. 11, n.4, does not compel affirmance. Leaving aside the strikingly different background and procedural posture of that landmark decision, it was based on the finding imputed to Congress that racial discrimination by hotels affected interstate commerce, and, further, that 75% of the guests at the hotel involved were from outside the state. *See* 379 U.S. at 243, 252-253. *Heart of Atlanta* did not hold that the commerce clause—and, therefore, the Sherman Act—applied to every local activity some of whose participants came from outside the state. Moreover, petitioners suggest that a motel, 75% of whose transient guests are themselves "in commerce" both before and after their patronage, has plainly injected itself into that stream of commerce. The same can scarcely be said of a real estate agent, some of whose customers subsequently leave the state wherein the brokered realty is located.

In summary, therefore, petitioners contend that their activities are neither "in interstate commerce" nor do they "affect interstate commerce" in the sense contemplated by *Goldfarb*. Accordingly, their motion to dismiss for want of federal subject-matter jurisdiction should have been granted.

II. The Decision Below Raises Significant Questions Concerning The Application Of This Court's Holding In *United States* v. *United States Gypsum Co.*

This was the first conviction under § 1 of the Sherman Act since enactment of the Antitrust Procedures and Penalties Act, P.L. 93-528, 88 Stat. 1706, 1708 (1974), made violations of that section felonies, and this petition appears to be the Court's first occasion to consider the precedents relating to the requisite degree of criminal intent for purposes of § 1, in light of its recently elevated level of criminality. Petitioners therefore urge this Court to consider anew the question of *mens rea* for purposes of § 1 in light of its recent decision in *United States* v. *United States Gypsum Co.*, —— U.S. ——, 98 S.Ct. 2864 (1978), and to conclude that the petitioners' convictions effectively denied them due process of law.[4]

Prior to *Gypsum*, this Court was thought to have held that "specific intent" need not be shown to support a Sherman Act conviction. *United States* v. *Patten*, 226 U.S. 525 (1913); *United States* v. *Masonite Corp.*, 316 U.S. 265 (1942). Even so, such holdings were thought to constitute narrow exceptions to the *mens rea* re-

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[4] *See, contra, United States* v. *Continental Group, Inc.*, 456 F. Supp. 704 (E.D. Pa. 1978). The court recognized, however, that *Gypsum's* holding was limited to misdemeanor cases.

quirement discussed so eloquently by Justice Jackson in *Morissette* v. *United States,* 342 U.S. 246 (1952), as quoted at length in this Court's opinion in *Gypsum.*

In *Holdridge* v. *United States,* 282 F.2d 302 (8th Cir. 1960), Judge (now Justice) Blackmun analyzed the principles of *Morissette,* and set forth those conditions under which proof of specific intent may be dispensed with consistently with the Constitution:

> From these cases emerges the proposition that where a federal criminal statute omits mention of intent and [1] where it seems to involve what is basically a matter of policy, [2] where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, [3] where the penalty is relatively small, [4] where conviction does not gravely besmirch, [5] where the statutory crime is not one taken over from the common law, and [6] where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent. The elimination of this element is then not violative of the due process clause.

282 F.2d at 310.

As a felony, § 1 of the Sherman Act plainly fails to meet at least four of the factors identified in *Holdridge.* Accordingly, petitioners urge this Court to adopt the *Holdridge* analysis and, in the light of that analysis, to decide whether the instructions on intent in the case at bar can pass constitutional muster.

In urging the Court to undertake such a process of clarification, petitioners are not the first to suggest that a requirement of specific intent might be appropriate in this and similar cases:

> As convicted violators of the Act henceforth will be felons, suffering all the collateral consequences

> of felony convictions as well as substantial penalties, they should be accorded all the rights that are usually accorded accused felons. Most fundamentally, they should have the benefits of the burden of proof usually imposed on the government in felony cases. In light of the change in the Sherman Act violation, the settled Sherman Act law of *mens rea* and overt acts deserve reconsideration. In the usual section 371, Title 18 case, proof of a felonious conspiracy requires proof of specific intent and proof of an overt act in furtherance of the conspiracy. It may be time to read these requirements into criminal prosecutions under the Sherman Act.

United States v. *Nu-Phonics, Inc.,* 433 F.Supp. 1006, 1015 (E.D. Mich. 1977) (footnote omitted). Similarly (albeit in the slightly different context of conscious parallelism):

> The charge of engagement in a classic conspiracy is a charge of reprehensible conduct and conviction brings the punishment and opprobrium associated with that characterization. Conviction of that crime ought not to be imposed on the innocent because, given the market structure, self-regarding but independent decisions have led to objectionable economic results.

L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 321-322 (1977).

Indeed, the record in the case at bar illustrates very well that "self-regarding but independent decisions" may have been made without any intent on the part of petitioners or their co-defendants to restrain trade. The record shows beyond cavil that 1974 was a bad—if not disastrous—time for Montgomery County realtors. Evidence was introduced to show that while, in

1971, there were 4,092 sales against 7,481 listings in the Board of Realtors' multiple listing service, the corresponding 1974 figures were 5,299 and 12,639, respectively. In other words, since commissions attach only to completed sales, commissions in 1974 had to support far greater sales effort than they did in 1971. The evidence was uncontroverted that Foley's decision to raise his firm's commission rate was made before the dinner and that he did not care if others did likewise, since economic factors gave him no choice. Carruthers' accountant, moreover, had advised him, before the September 5 dinner, to raise commission rates irrespective of the actions of his competitors. And, indeed, approximately half the firms in Montgomery County raised their prevailing rate to 7% at some time during 1974 or 1975. Most of those firms, of course, were not represented at the September 5 dinner. This economic background illustrates particularly well the danger of relaxing the standards for sufficiency of evidence and *mens rea* in general. The policy arguments on this score that might have suggested themselves to this Court when it decided *Gypsum* would seem to apply with even greater force to convictions under what is now a felony statute.

Unlike the offense charged in *Gypsum,* the price fixing charged in the instant case is acknowledged to be a *per se* offense under the Sherman Act. *See, e.g., United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940). Petitioners are not objecting to application of the *per se* rule, by which proof of certain activities, including price fixing, creates a presumption that they affect the interstate commerce in question, and thereby eliminates the need for proof respecting that effect on interstate commerce.

But *Gypsum* did not distinguish between *per se* offenses and "rule of reason" offenses, insofar as scienter was concerned, and the petitioners do not seek any such distinction. Petitioners merely contend that defendants in a *per se* case should not be convicted on the basis of any lesser degree of criminal intent than that which suffices for conviction of a "rule of reason" offense. In terms of the instant case, then, petitioners object to the fact that the jury was never instructed that, in order to convict, it must find that petitioners agreed to fix prices, *intending thereby to restrain trade in used residential property.* An instruction to that effect, it must be stressed, would impinge in no way on the operation of the *per se* rule, for the issue presented by the trial court's instructions on criminal intent was *not* whether the government need *prove* an effect on interstate commerce, but rather, whether petitioners *intended* that their actions have such an effect.[5] Application of the *per se* rule to demonstrate effect is a far cry from reliance on it to infer a defendant's state of mind. That price fixing is a *per se* offense is totally irrelevant to the issue of whether petitioners were convicted without a finding by the jury that they possessed that degree of criminal intent which the due process clause requires as the predicate of a felony conviction.

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[5] Petitioners do not and need not embrace the proposition, possibly imputed to them by the court below, that "intent" for purposes of their convictions must mean an intent "to denigrate or mock the law in the sense apparently of intending specifically to violate the Sherman Act", slip op. at p. 25, n.12. Presumably, some Sherman Act defendants have never even heard of the Sherman Act, and could therefore never form the degree of intent hypothesized by the court below. Petitioners do argue, however, that the necessary degree of criminal intent must encompass each element of a violation of § 1 of the Sherman Act, whether or not the defendant may have been familiar with its provisions.

Petitioners recognize that the trial judge's instructions to the jury included the words "knowingly" and "knowing". Accepting the jury's factual findings—as they must, for purposes of this appeal—petitioners thus recognize that they were found to have "knowingly" entered into an agreement. Admittedly, they were aware of what was going on in the room, but, beyond that, it is most unclear what it is that they were found to "know". Certainly, their knowledge did not include the fact that they were violating the Sherman Act,[6] and, so far as the record reveals, neither their knowledge nor their intent extended to restraining trade. Therefore, petitioners urge this Court to define more clearly those components of the degree of criminal intent clearly recognized by the Court's opinion in *Gypsum* to be an essential element of the crime of price fixing.

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[6] In fact, the record reveals that one of the attendees at the September 5 dinner, an attorney, was asked whether the discussion of commission rates constituted an antitrust violation. He replied correctly that it did not, so long as no agreement was reached.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue for review of the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

RICHARD A. HIBEY
SURREY, KARASIK AND MORSE
1156 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 331-4000

and

WILLIAM W. CAHILL, JR.
WEINBERG AND GREEN
10 Light Street
Baltimore, Maryland 21202
(301) 332-8600

Attorneys for Petitioners
Colquitt-Carruthers, Inc.
and John T. Carruthers, Jr.

Of Counsel:

ROBERT J. MCMANUS
SURREY, KARASIK AND MORSE

Attorney for Petitioners
Colquitt-Carruthers, Inc.
and John T. Carruthers, Jr.

and

JAMES K. ARCHIBALD
VENABLE, BAETJER AND HOWARD

Attorney for Petitioners
John P. Foley, Jr. and
Jack Foley Realty, Inc.

and

JOHN H. LEWIN, JR.
VENABLE, BAETJER AND HOWARD
1800 Mercantile Bank & Trust
Building
2 Hopkins Plaza
Baltimore, Maryland 21201
(301) 752-6780

Attorney for Petitioners
John P. Foley, Jr. and
Jack Foley Realty, Inc.

May 18, 1979

EXHIBIT A

EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-5013

UNITED STATES OF AMERICA, *Appellee*,

versus

JOHN P. FOLEY, JR., AND
JACK FOLEY REALTY, INC., *Appellants*.

No. 78-5014

UNITED STATES OF AMERICA, *Appellee*,

versus

BOGLEY, INC., *Appellant*.

No. 78-5015

UNITED STATES OF AMERICA, *Appellee*,

versus

COLQUITT-CARRUTHERS, INC.,
AND JOHN T. CARRUTHERS, JR., *Appellants*.

No. 78-5016

UNITED STATES OF AMERICA, *Appellee*,

versus

ROBERT L. GRUEN, INC., *Appellant*.

No. 78-5017

UNITED STATES OF AMERICA, *Appellee*,

versus

SCHICK & PEPE REALTY, INC., *Appellant*.

No. 78-5018

UNITED STATES OF AMERICA, *Appellee*,

versus

SHANNON & LUCHS CO., *Appellant*.

No. 78-5019

UNITED STATES OF AMERICA, *Appellee*,

versus

ROBERT W. LEBLING, *Appellant*.

Appeal from the United States District Court for the District of Maryland, at Baltimore. C. Stanley Blair, District Judge.

Argued October 5, 1978. Decided April 19, 1979

Before WINTER, *Circuit Judge*, COWEN *, *Senior Judge* and PHILLIPS, *Circuit Judge*.

Richard A. Hibey (Robert J. McManus, Surrey, Karaski and Morse; William W. Cahill, Jr., Weinberg and Green on brief) for Appellants Colquitt-Carruthers, Inc. and John T. Carruthers, Jr.; James P. Mercurio (Salvatore A. Romano, Lewis E. Leibowitz, Arent, Fox, Kintner, Plotkin & Kahn on brief) for Appellant Shannon & Luchs Company; John Henry Lewin, Jr. (James K. Archibald, Venable, Baetjer and Howard on brief) for Appellants Jack Foley Realty, Inc. and John P. Foley, Jr.; Raymond W. Bergan (Robert P. Watkins, Williams and Connolly on brief) for Appellants Bogley, Inc. and Robert W. Lebling; William O. Bittman (George R. Clark, Pierson, Ball and Dowd on brief) for Appellant Robert L. Gruen, Inc.; Catherine G. O'Sullivan, Department of Justice (John H. Shenefield, Assistant Attorney General, Robert B. Nicholson, Charles S. Stark, Gary

* Honorable Wilson Cowen, Senior Judge, United States Court of Claims, sitting by designation.

L. Halling, Department of Justice on brief) for United States of America.

PHILLIPS, *Circuit Judge*:

Six corporate and three individual defendants appeal their felony convictions for conspiracy to fix real estate commissions in Montgomery County, Maryland in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. Finding no error, we affirm.

During the critical period in question all the defendants were realtors engaged as competitors in the business of "reselling" houses. When a person desired to sell his house in Montgomery County he listed it with a realtor, provided he did not decide to attempt to sell it directly. The listing provided that when the house was sold a fixed percentage of the sales price would be paid as a commission to the realtor. This commission was divided among the firms involved in the sale, a portion going to the firm that obtained the listing, another portion to the firm that produced the buyer. To facilitate the operation of this shared commission arrangement, each of the defendants belonged to the Montgomery County Board of Realtors, a trade association that operated a multiple listing service. In the case of almost all houses listed with a member realtor, the member sent a card to the listing service containing a picture of the house and certain pertinent information, including the commission. Thus all member realtors had available a fairly comprehensive list of houses on the market in the county.

During the summer of 1974, and for some time before, the prevailing commission rate in Montgomery County was six percent of the sales price. A few houses were listed at seven percent, but additional services were apparently provided for the higher rate. At this time the real estate brokerage business in the county was in difficult straits.

While the number of houses listed with brokers for resale had continued to rise as it had for several previous years, the number of sales had fallen, mortgage funds were in short supply and increasing costs of stationery, telephone service, advertising and gasoline had reduced the profit margin.

On September 5, 1974, defendant John Foley, the president of defendant Jack Foley Realty, Inc., hosted a dinner party at the Congressional Country Club in Bethesda, Maryland. The guests were nine of the leading realtors in Montgomery County, including each of the three individual defendants and one representative of each of the corporate defendants in this appeal.[1] Following the meal, Foley arose and, after making some other remarks, announced that his firm was raising its commission rate from six percent to seven percent. A discussion about the rate change ensued. Within the following months each of the corporate defendants substantially adopted a seven percent commission rate.

A United States grand jury for the district of Maryland indicted the nine defendants on April 1, 1977. Following a number of preliminary motions, the only one of which is of interest to this appeal being the denial of a motion to dismiss for lack of subject matter jurisdiction, a nine day jury trial was held in September 1977 before Judge Stanley Blair. All defendants were found guilty and this appeal ensued.

Several issues are presented by the appeals. Part I of the opinion addresses the contention that the district court

[1] Defendant Colquitt-Carruthers, Inc. was represented by defendant John T. Carruthers, Jr.; defendant Shannon & Luchs Co. was represented by William Ellis; defendant Schick & Pepe Realty, Inc. was represented by Allyn Rickman; defendant Bogley, Inc. was represented by defendant Robert W. Lebling; and defendant Robert L. Gruen, Inc. was represented by Robert L. Gruen.

lacked subject matter jurisdiction because of an insufficient nexus between defendants' conduct and interstate commerce. Part II evaluates the sufficiency of the evidence that a conspiracy was formed and that each defendant participated in it. Part III deals with several objections to the jury instructions. Finally, Part IV discusses a number of evidentiary issues. Additional facts will be developed as pertinent to the several issues.

I. Interstate Commerce

The defendants contend that their activities were not proven to be sufficiently related to interstate commerce to support their convictions under 15 U.S.C. § 1. Our review is to determine whether, within applicable principles of law, the evidence was sufficient, when viewed in the light most favorable to the Government, *United States v. Sherman,* 421 F.2d 198, 199 (4th Cir. 1970) (per curiam), to support the jury's finding on this issue.[2]

[2] A sufficient relationship to interstate commerce is both a critical jurisdictional fact and an element of the substantive offense charged under 15 U.S.C. § 1. Facts sufficient for the one are sufficient for the other, and vice-versa. Existence of the jurisdictional fact may be attacked independently, or in conjunction with the defense on the merits. *Cf. McLain v. Real Estate Board of New Orleans,* 583 F.2d 1315, 1323-24 (5th Cir. 1978) (discussing comparable procedures in civil actions). In this case, all the defendants but Schick & Pepe Realty, Inc. made a jurisdictional attack by pre-trial motion to dismiss the indictments under Fed. R. Crim. P. 12. The district court denied this motion, assessing the facts as charged in the indictments. When the case then proceeded to trial, the substantive interstate commerce issue was submitted to the jury and found against the defendants. Defendants' attack is therefore upon the jury's finding on this issue as it was necessarily subsumed within the general verdict of guilty. No challenge having been made to the district court's instruction on the issue, we assume its correctness. The only remaining basis for challenge is therefore to the sufficiency of the evidence to support the implicit jury finding on this issue, and it is this we re-

We start with the applicable legal principles. Jurisdictional reach of the statute is coterminous with Congress' power to regulate interstate commerce. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194 (1974); *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 558 & n.46 (1944); *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 395 (4th Cir. 1974). Where conspiracy is charged, it must be shown that it has a sufficient nexus with interstate commerce, but this does not require proof that each charged defendant's activities had the requisite effect. *E.g., United States v. Wilshire Oil Co.*, 427 F.2d 969, 974 (10th Cir. 1970). The existence of a sufficient nexus is to be determined on a practical rather than theoretical basis. *E.g., Swift & Co. v. United States*, 196 U.S. 375, 398 (1905). This means that the determination involves not only raw fact finding but evaluation of the facts by the trier of fact. Accordingly, the results in particular cases are likely to have turned, quite appropriately, on their peculiar facts rather than on legal standards generally applicable to particular categories of business, professional, or trade activities. Thus, the cases that have considered the relationship of particular real estate brokerage activities to commerce are in hopeless disarray so far as their raw results are concerned. *See McLain v. Real Estate Board of New Orleans, Inc.*, 583 F.2d 1315, 1319-20 (5th Cir. 1978) (collecting cases). This means that the guiding legal principles must be sought at a more general level than any keyed to the particular nature of the real estate brokerage business, and that detailed efforts to reconcile the disparate results in particular real estate brokerage cases are likely to be bootless.

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view. Because there is no sugegstion of variance between indictment and proof, review of the sufficiency of the evidence on the substantive issue necessarily reviews the sufficiency of the facts as found to support the court's jurisdiction. The jury's findings on the evidence thus in effect supersede the district court's jurisdictional finding on raw factual averments in the indictments.

The traditional mode of analysis seeks the requisite nexus along one or both of two general lines of inquiry unrelated in terms to particular categories of commercial activities. One inquires whether the activities alleged to be under illegal restraint lie directly in the flow of interstate commerce; the other, whether though intrastate in nature, they nevertheless have so great an impact on interstate commerce that they substantially affect it. *See, e.g., Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d at 395 (articulating and discussing the two tests). Obviously these are not bright line, mutually exclusive tests and it is quite possible to analyze a particular pattern of activities without express reliance upon either.[3] Each, after all, strives for answers to the more general question, whether the activities under alleged restraint have a sufficient nexus with interstate commerce. Particular activities may fall within both patterns. Activities directly in the flow of interstate commerce need have but minimal impact upon the commerce to "affect" it, since by definition they are a very part of the stream. *See, e.g., Swift & Co. v. United States*, 196 U.S. at 398-99. Activities not in the flow of interstate commerce, *i.e.*, intrastate in basic nature, may only be found to affect interstate commerce if their impact upon it is substantial. *Compare, e.g., Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948) (substantial), *with, e.g., Apex Hosiery Co.*

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[3] It may be questioned whether, in any event, these two "tests" will withstand logical scrutiny as discretely different frameworks for close legal analysis. Courts quite frequently conduct searching interstate commerce relationship analyses without express reliance upon them. *See, e.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). Significantly on the point, while both sides and the district judge in this case assumed that *Goldfarb* was a "local but affecting" case, a distinguished constitutional scholar in a recent analysis assumed without elaboration that it was an "in-commerce" type. Strong, *Court vs. Constitution: Disparate Distortions of the Indirect Limitations in the American Constitutional Framework*, 54 N.C.L. Rev. 125, 137-40 (1976).

v. Leader, 310 U.S. 469 (1940) (unsubstantial). Under either test and in all events, the impact must be upon an identifiable stream of "commerce," and not simply upon a particular business that may be engaged in interstate commerce. *See McLain v. Real Estate Board of New Orleans*, 583 F.2d at 1318-19.

In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), on facts closely analogous in many respects to those presented in the instant case, the Supreme Court articulated a test of interstate commerce relationship in which these two traditional tests may be thought to have coalesced, though neither was drawn upon in express terms. Because both sides on this appeal and the district judge in his rulings below perceived—as we do—the critical relevance of *Goldfarb* to this case, the test there stated bears emphasis here before the evidence is analyzed. In finding a sufficient nexus between the title search activities of certain Virginia lawyers and an identifiable stream of interstate real estate financing transactions, the *Goldfarb* Court stated the test simply as "whether as a matter of law or practical necessity [the] services [were] an integral part of an interstate transaction." *Id.* at 785. Certain critical aspects of the context in which the lawyers were observing a minimum fee schedule for their services were emphasized by the Court. There were that lending institutions routinely required title insurance as an incident to making mortgage loans in the Virginia County in question; that this in turn required title examinations; that state regulatory authority required that this service be performed only by licensed lawyers; that the lawyers thus favored were observing a minimum fee schedule promulgated by their professional association; and that a considerable volume of the loans involved were funded by out-of-state lending institutions, insured by out-of-state insurance companies, and guaranteed by out-of-state federal agencies. From this combination of factors, the Court concluded that the title examination service for which fixed fees were being charged was "an integral part of an interstate transaction," and that "[g]iven the substantial volume of commerce involved, and the inseparability of this particular legal service from the interstate aspects of real estate transactions . . . interstate commerce has been substantially affected. *Id.* at 785 (footnote omitted).

In this case, as in *Goldfarb*, the evidence was quite sufficient to permit the trier of fact to determine that the activities in question, here those of real estate brokers, were as a matter of practical necessity an integral part of an identifiable stream of interstate real estate transactions. The charged conspirators here were shown to be engaged in a business that consisted essentially of bringing together prospective buyers and sellers of residences in Montgomery County, Maryland, and then facilitating in various ways the consummation of resulting sale-purchase agreements between sellers and buyers. Montgomery County is a suburban area contiguous to the District of Columbia, and the brokers in question consciously and understandably capitalized upon the highly transient nature of this particular real estate market. A quite considerable volume of the total of brokered sales in which they participated involved purchasers coming into the state and sellers leaving the state.[4] Extensive advertising of the brokerage services

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[4] Distinguishing this case factually from those wherein real estate brokerage activities were not shown to have involved any considerable volume of out-of-state buyers and sellers. *E.g., Diversified Brokerage Services, Inc. v. Greater Des Moines Board of Realtors*, 521 F.2d 1343, 1346 (8th Cir. 1975). While it may generally be correct to say that "the mere movement of individuals from one state to another in order to utilize particular services does not transform those services into interstate services within the meaning of the Sherman Act," *id.*, that hardly describes the factual situation presented here. A more apposite principle for the facts of this case is the congressional determination up-

was placed by various ones of the defendants in out-of-state media, including military and civil service personnel journals.[5] Some of the brokers participated in national "relocation" services[6] and extensively used interstate channels of communications[7] in developing and servicing the out-of-state clientele. A considerable amount of the financing for brokered purchases came from out-of-state lending institutions and substantial numbers of the purchase loan mortgages were guaranteed by federal agencies headquartered in the District of Columbia.[8] While the charged brokers did not participate directly in the interstate lending and loan guarantee transactions incident to their brokered sales, they clearly held out as part of their brokerage serv-

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held in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1969) that even "local" businesses that provide services to substantial numbers of persons traveling across state lines may affect interstate commerce. Here, as the analysis in the body of our opinion shows, there was much more of an interstate character to defendants' activities than merely awaiting passively the chance descent of out-of-state customers and then providing these with purely "local" services.

[5] This included advertising in Washington, D. C. newspapers and radio stations (App. 111, 998, 1003), the *Foreign Service Journal*, and the *Army, Navy, Air Force Times* (App. 1020-21). At least one defendant advertised its use of a "Military Transfer Department" and a "Corporate Referral Department" which enabled it to identify potential buyers and sellers among military and business transferees (App. 1042-43); offered to military personnel a "Free Relocation Kit" (App. 187-88); and invited collect telephone calls from prospective home purchasers coming into the Washington, D.C. area (App. 1039).

[6] Incident to which they paid commissions directly to out-of-state brokers who found purchasers for their listings, and received commissions directly from out-of-state brokers to whom they referred clients. (App. 998-99, 1004, 1014, 1020).

[7] *See American Power & Light Co. v. S.E.C.*, 329 U.S. 90, 98-99 (1946); *North Am. Co. v. S.E.C.*, 327 U.S. 686, 694-95 (1946).

[8] App. 970-95, 997-99, 1003-04, 1019-23, 1062.

ices their ability to facilitate these.[9] The overall picture that emerges is one of a substantial stream of interstate commerce in which these brokers' activities were not only an "integral part," but in practical effect the dominant factor in first creating a substantial interstate market by utilizing interstate advertising and referral services, and then drawing in interstate funding and loan guarantees for the resulting purchase money mortgages. While there are of course differences between the lawyers' activities in *Goldfarb* and the brokers' in the instant case, most suggest a more, not less, substantial impact on interstate commerce for the brokers' activities than for the lawyers'. Defendants emphasize that the brokers' services here were not undergirded by legal compulsion as were those of the lawyers' in *Goldfarb*. While that is true, the practical necessity for utilizing a local broker's services, particularly for out-of-state purchasers and sellers was substantially equal on the evidence presented, hence quite as integral and "inseparable" a part in the final analysis. And on the other hand, while the lawyers in *Goldfarb* took no specific part in creating the critical interstate market of specific buyers and sellers necessary to generate their fees, the brokers in the instant case played a dominant part in creating the specific interstate market that ultimately provided their commissions.

The impact of the charged restraint on the brokerage services demonstrably had a substantial effect on interstate commerce. Since the conspiracy as charged raised the price of the critical service of bringing together the home sellers and buyers, this affected the need for financing "as a matter of practical economics." *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 745 (1976); *see id.* at 744-47. Similarly, increased prices resulting from increased broker-

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[9] One advertised that potential purchasers should consult a broker because he could "guide in getting a loan," and will "be able to negotiate the best available financing." (App. 1046).

age commissions must, as a matter of practical economics, confront every purchaser wishing to buy a Montgomery County residence. Therefore, as in *Goldfarb*, the numerous out-of-state purchasers of these residences could not as a practical matter escape the effect of these commissions.

Whether analyzed as being in the flow of interstate commerce, as local but substantially affecting interstate commerce, or as being by practical necessity an "integral part" of identifiable interstate transactions, the evidence here adequately supported the jury's finding of a sufficient nexus between the brokers' activities and interstate commerce, and of a substantial effect of the restraint charged upon that commerce.

II. Conspiracy and Participation

Defendants next contend that there was insufficient evidence, though considered in the light most favorable to the government, to allow a jury to find the existence of a conspiracy and the participation of each defendant in it beyond a reasonable doubt. Their related contention that guilt beyond a reasonable doubt can only exist if all other reasonable hypotheses are negated has been rejected. *United States v. Bobo*, 477 F.2d 974, 989 (4th Cir. 1973). A final suggestion that our review on this point be more stringent because this is a felony, rather than a misdemeanor, prosecution is also without merit. Neither the classification of the offense nor the extent of the possible punishment in any way affects the question whether there was sufficient evidence of each element of an offense. Our review of the evidence leads to the conclusion that under applicable standards of review the evidence was sufficient to sustain the jury findings on these issues.

A. *The Evidence of Conspiracy*

Proof of a § 1 conspiracy need not be direct. "Acceptance by competitors of an invitation to participate in a plan,

the necessary consequence of which, if carried out, is a restraint of commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act, where each competitor knew that cooperation was essential to successful operation of the plan." 3 P. Areeda & D. Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 841a, at 361-62 (1978). While such evidence does not compel a finding of conspiracy, *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954), it does permit such a finding, *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939); *Esco Corp. v. United States*, 340 F.2d 1000, 1007 (9th Cir. 1965). Within this principle, we find ample evidence to permit the finding of a conspiracy involving each of the defendants.

In the months preceding the September 5 dinner, several of the defendants were contemplating a change in commission rate, but were concededly afraid to undertake such a move for fear that they would be unable successfully to compete with firms still at six percent. Schick & Pepe had previously attempted to go to a seven percent rate and had failed because of competition. It was in this general climate of concern about competitive constraints that Foley called the meeting of September 5. At the dinner Foley rose, made some prefatory remarks and then stated that his firm was in dire financial condition. Saying that he did not care what the others did, he then announced that his firm was changing its commission rate from six percent to seven percent. Testimony as to what was said by various persons in the ensuing discussion is greatly in conflict, but there was evidence from which the jury could find that each of the individual defendants and a representative of each corporate defendant not represented by one of the individual defendants expressed an intention or gave the impression that his firm would adopt a similar change. The discussion also included reference to the earlier unsuccessful effort by Schick & Pepe to adopt a seven percent policy,

from which the jury could conclude that defendants knew that their cooperation was essential. Evidence presented in the form of detailed charts with explanation by an economist qualified as expert witness showed that in the months following each defendant did in fact begin to take substantial numbers of seven percent listings. Moreover, the jury heard testimony of a number of instances in which members of the conspiracy sought after the September 5 dinner to hold their fellows to the "agreement." Details of these events will be developed more fully in the following discussion of the connection of each defendant to the conspiracy.

B. *Connection of Each Defendant to the Conspiracy*

(1) *Jack Foley Realty, Inc. and John P. Foley, Jr.*

Jack Foley hosted the September 5 dinner, inviting in addition to a few realtors who were close personal friends, those he regarded as the most active members of his profession. He had previously announced the commission change to his staff and on September 15 mailed a notice concerning it to all local realtors. By early October, Foley, Inc. had thirty percent of its listings at the higher rate; by December, the figure was in excess of seventy percent and remained in that neighborhood throughout 1975.

Allyn Rickman, vice president of Schick & Pepe and a guest at the September 5 dinner, testified that after Schick & Pepe took some six percent listings, Foley called him and told him that was a "mistake" because if they all did not hold the line none of them could get seven percent.

Before the policy change, Foley's firm had accepted a house at a six percent listing. When the listing was renewed after the policy change, still at six percent, Foley, Inc. sent a card to the listing service which was in turn distributed to all the local realtors. A listing card was then received anonymously in the mail by Foley with a question

mark on it. When the house was again relisted, the contract and the listing with the service were both at seven percent. John O'Keefe, a vice president at Foley, Inc., however, wrote a letter to a homeowner/seller informing him that Foley would reimburse him for the extra one percent.[10] The letter contained the following explanation:

> "The reason I don't want [the listing] to go through showing 6% is our Firm was one of the leading Firms in changing from 6% to 7% and with Mr. Foley being the President of the Board of Realtors, I just don't want any unjust criticism of him or our Company for taking your listing at less than 7%."

(2) *Colquitt-Carruthers, Inc. and John T. Carruthers, Jr.*

John T. Carruthers of Colquitt-Carruthers, Inc. attended the dinner. The testimony conflicts on whether he said he was already at seven percent, or whether he was going to go to seven percent. His accountant testified that a policy change occurred between September 10 and September 24. Effective September 24, all listings other than at seven percent had to be accompanied by explanation; after November 1, they would not be accepted at less than seven percent. By October 1974, Colquitt-Carruthers had sixty percent of its listings at the new rate and through the end of 1975 the figure was generally in excess of eighty percent.

There was testimony that Carruthers made several attempts to ensure the cooperation of other firms. William Ellis, vice president of Shannon & Luchs Co., a firm that delayed implementation of the seven percent policy, testified that Carruthers called him on three occasions. Around January 1, 1975, Carruthers called and asked about Ellis' "considerations." Ellis replied "You know I can't make

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[10] Foley and Foley, Inc. Inc. object to the admissibility of that letter. See Part IV *infra*.

the decision." Carruthers then offered to call the man who could make the decision. Later in January, Carruthers again called, this time explicitly asking about the change. Upon being told that Shannon & Luchs had adopted a seven percent policy, but had set no date for its implementation, Carruthers "threatened" Ellis with the loss of his job. In April when Shannon & Luchs' Gaithersburg, Maryland office took some six percent listings, Carruthers again called Ellis to complain.

Allyn Rickman, vice-president of Schick & Pepe Realty, Inc., also testified that Carruthers called him to complain about some six percent listings that Schick & Pepe had accepted.[11] He quoted Carruthers as saying "if we do not stay at seven percent, then it would be a slide back and . . . no one could get seven percent, because the competition would hurt us." There was also testimony that Carruthers complained to Robert Dorsey, a vice president at Bogley, Inc., about that firm having taken more six than seven percent listings.

(3) *Bogley, Inc. and Robert W. Lebling*

Robert Lebling, the president and seventy percent owner of Bogley, Inc., attended the September 5 dinner. The testimony is in conflict whether he said he would go to a seven percent rate, or that he would do so if it were to his advantage. On September 27, Bogley, Inc. adopted a policy of seeking seven percent but not losing any listings over the attempt. At least one version of the meeting at which that decision was made places the initiative for the proposal with Lebling. Bogley, Inc. had no seven percent listings from June through September 1974, but nearly fifty percent of the listings in October and November 1974 were

[11] Carruthers and Colquitt-Carruthers contend this testimony should not have been allowed. See Part IV *infra* where we conclude that there was no error in its admission.

at the higher rate and in December seventy percent were at the new rate. The percentage of seven percent listings fluctuated between forty and sixty-five percent until April, then settled at around thirty percent. Since the agreement itself, not its performance, is the crime of conspiracy, *United States v. Trenton Potteries Co.*, 273 U.S. 392, 402 (1927); *Plymouth Dealers' Association v. United States*, 279 F.2d 128, 132 (9th Cir. 1960), the partial non-performance of Bogley does not preclude a finding that it joined the conspiracy.

(4) *Schick & Pepe Realty, Inc.*

Allyn Rickman, vice president of Schick & Pepe Realty, attended the dinner. He testified that he stated at that time that his firm would adopt a seven percent policy. On October 4, 1975, it did adopt such a policy and by November had well over eighty percent of its listings at the higher rate. Rickman testified that but for the dinner the firm would not have changed its policy. In August, the firm had considered such a change, but decided against it because of fear that it would be unable to compete for listings. There was also evidence that Rickman complained to Robert Dorsey, vice president of Bogley, Inc., about Bogley's failure to take only seven percent listings.

(5) *Shannon & Luchs Co.*

Shannon & Luchs did not officially adopt a seven percent policy until January 1975. At the dinner, its vice president, William Ellis, stated that they should not be discussing a rate increase and said that his firm was always the first to be investigated when something like this happened as it was the county's largest. He also stated that Shannon & Luchs would probably go to seven percent at a later date; Allyn Rickman remembered a possible mention of the first of the year. On September 9, Ellis told his mana-

gers not to turn down any seven percent listings they had an opportunity to get. In fact, the percentage of seven listings taken by Shannon & Luchs crept toward thirty percent by January 1975. Early in January, John T. Carruthers called Ellis and asked about his "considerations." Ellis told him that he, Ellis, did not make those decisions and Carruthers then offered to telephone the man who did; Ellis replied that he did not need help. On January 15, at Ellis' suggestion, Shannon & Luchs adopted a policy of taking seven percent listings unless some other rate were beneficial to the firm or otherwise appropriate. Although the new policy was not implemented until March 1, by that time forty percent of Shannon & Luchs' listings were at seven percent. By early April, the figure was about sixty-five percent and throughout 1975 it stood between eighty and ninety. In response to a comment from Carruthers in April, Ellis acknowledged that he had a "problem" in his Gaithersburg, Maryland office in implementing the policy. Shannon & Luchs did not adopt a seven percent policy for its offices in northern Virginia because of the threat of competition.

(6) *Robert L. Gruen, Inc.*

Robert Gruen attended the Congressional Country Club dinner. While Allyn Rickman's testimony is in conflict as to Gruen's statements at that dinner, on more than one occasion he testified that Gruen said he was going to go to seven percent. Louise Lewis, a Gruen sales agent, testified that the Gruen policy as early as June 1974 was at least to seek seven percent listings, but acknowledged that she sought no seven percent listings before September.

Gruen had one listing at seven percent out of a total of seven in August 1974 and none in September, but took three of eleven at the higher rate in October. By early 1975, the firm consistently had eighty percent or more of its listings at seven percent.

Gruen makes much of the fact that it had seven listings at seven percent from March to August 1974 and also had seven such listings from September to December. Put in percentages, however, that apparent continuity evaporates: the March to August figure represents only ten percent of Gruen's listings; there were no seven percent listings in September; and from October to December, Gruen had thirty-five percent at a seven percent commission. These figures are sufficient to allow the jury, in connection with Rickman's testimony, to conclude that Gruen also adopted a higher commission rate following the September 5 dinner and that that adoption was part of the alleged conspiracy.

C. *Conclusion*

We conclude that this evidence, here merely summarized and highlighted from a much more detailed body of proof adduced by the Government, was sufficient to permit the jury to find as it did against each of the defendants on the conspiracy issue. Defendants of course offered explanatory and exculpatory evidence, and on this appeal urge that the proper inferences to be drawn from all the evidence relieve their actions of criminal implications. Among these arguments is the interesting one that only by graceless refusals to accept Foley's invitation to dinner or by equally graceless withdrawals from it once its purpose was revealed could they have avoided the factual inferences required to implicate them in the conspiracy, and that to sustain their convictions will impose intolerable burdens on businessmen confronted with like dilemmas. This, with other arguments about the proper inferences to be drawn from the evidence, was undoubtedly presented to the jury by able counsel for the defendants. A properly composed jury of defendants' peers rejected this factual argument as well as others in reaching its verdict of guilty. That to sustain the jury finding on this issue may have the inhibitory effect on the conduct of others that is urged by defendants does not

speak to the force of the evidence supporting the jury's finding in this case.

III. Jury Instruction

Defendants complain that the court failed to instruct the jury that it had to find that defendants acted with specific intent before it could find them guilty beyond a reasonable doubt. While this contention is none too plainly developed, it apparently comes to the suggestion that to be convicted of a felony violation of § 1 they had to conspire with the specific intent to accomplish a restraint of trade.[12]

Section 1 had traditionally been interpreted to define a strict liability offense, *e.g., United States v. Patten,* 226 U.S. 525, 543 (1913), until in June 1978, the Supreme Court held that a criminal conspiracy prosecution under § 1 must include proof that the defendants acted with knowledge that their conduct would affect prices. *United States v. United States Gypsum Co.,* 98 S. Ct. 2864, 2877 (1978). *Gypsum* involved a misdemeanor case, the indictment having been brought prior to the effective date of the 1974 amendment making § 1 a felony provision. From this, defendants contend that the scienter requirement imposed in *Gypsum* is not necessarily as stringent as that required for the now felony offense.[13]

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[12] Some defendants may contend for an even more specific intent: to denigrate or mock the law in the sense apparently of intending specifically to violate the Sherman Act. Because we find even the less stringent requirement without support, we do not address this one.

[13] *Gypsum* also involved a rule of reason offense rather than a per se violation of § 1 such as the price fixing here alleged. While the Court's analysis is in part dependent on the relative lack of notice provided by rule of reason offenses, the rule announced is framed in terms of all § 1 criminal prosecutions.

While certain conduct may not be made criminal without including as an element of the offense a certain degree of scienter, we do not beleive the 1974 amendment of the Sherman Act, Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1706, 1708 (1974), mandates that specific intent in the sense apparently suggested by defendants be made an element of a § 1 conspiracy. Although in most cases particular scienter requirements seem to be based simply on statutory construction, *see Morrissette v. United States,* 342 U.S. 246 (1952), there are undoubtedly due process restrictions on the legislature's power to define certain conduct as criminal absent particular scienter requirements. *E.g., Lambert v. California,* 355 U.S. 225, 228 (1957); *Holdridge v. United States,* 282 F.2d 302 (8th Cir. 1960) (Blackmun, J.). We think neither the amended statute nor the Constitution require the specific intent apparently contended for by defendants here.

In increasing the penalties for violating § 1 and redefining the offense as a felony, Congress did not intend to change the elements of the offense. *E.g.,* 120 Cong. Rec. 36340 (1974); *see United States v. Continental Group, Inc.,* 456 F. Supp. 704, 717 (E.D. Pa. 1978); *United States v. Noll Manufacturing Co.,* 1977-2 Trade Cas. ¶ 61,712 (N.D. Cal. 1977). Hence, we consider the *Gypsum* rule, so far as statutory interpretation is concerned, still to apply to § 1 offenses.

Neither do we find merit in the argument that constitutional considerations require proof of "specific intent" in the sense urged by defendants. While intent of the specificity apparently urged by defendants may be constitutionally mandated with respect to offenses impinging highly protected realms of conduct such as speech, *see Smith v. California,* 361 U.S. 147, 154 (1959) (reserving question), in the area of commercial regulation due process does not require more at the outside than that a defendant shall have acted with knowledge of the anticipated consequences of his action. *Gypsum,* 98 S. Ct. at 2878.

We thus find no error in Judge Blair's instructions in which he told the jury in substance that it must find beyond a reasonable doubt that defendants must have known that their agreement, if effectuated, would have an effect on prices; that they knowingly joined a conspiracy whose purpose was to fix prices; and that in joining they intended to further that purpose.

Defendant Shannon & Luchs also complain of the following instruction, asserting that it required too little connection with the conspiracy:

> "[The requirement that the evidence show beyond a reasonable doubt that the Defendants knowingly participated in the unlawful plan with the intent to further or advance some object or purpose of the conspiracy] is satisfied if the evidence shows beyond a reasonable doubt a knowing assistance of any kind in effectuating the objective of the conspiracy."

Without deciding whether this particular portion of the charge required too little connection, we conclude that the charge as a whole did require a sufficient involvement by each defendant. For example, within paragraphs of the allegedly deficient instruction, the following was charged:

> "A Defendant may be found guilty of a conspiracy only if the Defendant understood that he had joined the single overall conspiracy that is charged. If any Defendant was not a party to that overall agreement or conspiracy, you must find that Defendant not guilty even if he participated in isolated or subsidiary actions or events which aided the ends of the conspiracy."

Robert Lebling, Bogley, Inc., John T. Carruthers and Colquitt-Carruthers, Inc. complain that the court failed to instruct that proof of good character *alone* can create reasonable doubt. Judge Blair gave substantially the charge requested, but refused to include the word "alone." De-

fendants rely on *Michelson v. United States*, 335 U.S. 469 (1948), for the proposition that this refusal was error.

Michelson, an opinion dealing with the admissibility of character evidence, does include dictum that in a proper case a defendant who puts on substantial evidence of good character is entitled to an instruction that such evidence alone may create reasonable doubt, *id.* at 476, but the Circuits have split on whether such an instruction must be given. Two circuits hold that the word "alone" must be included. *United States v. Lewis*, 482 F.2d 632, 637 (D.C. Cir. 1973); *United States v. Donnelly*, 179 F.2d 227, 233 (7th Cir. 1950). The Tenth Circuit holds that "alone" must be included if good character is the only defense raised and perhaps in other circumstances, *Oertle v. United States*, 370 F.2d 719, 726-27 (10th Cir. 1966), but does not require it in all cases, *Swingle v. United States*, 389 F.2d 220, 222 (10th Cir. 1968); *see United States v. Tijerina*, 407 F.2d 349, 356 (10th Cir. 1969) (semble). The other circuits do not require that the word be included in the charge, at least where good character is not the only defense. *United States v. Fontenot*, 483 F.2d 315, 323 (5th Cir. 1973); *United States v. Lachman*, 469 F.2d 1043, 1046 & n.3 (1st Cir. 1972); *United States v. Fayette*, 388 F.2d 728, 737 (2d Cir. 1968); *United States v. Brown*, 353 F.2d 938, 939-40 (6th Cir. 1965); *Carbo v. United States*, 314 F.2d 718, 746-47 (9th Cir. 1963); *Black v. United States*, 309 F.2d 331, 343-44 (8th Cir. 1962); *see United States v. Klass*, 166 F.2d 373, 378-80 (3d Cir. 1948). In 1944 this Circuit held that the word "alone" need not be included in a charge. *Mannix v. United States*, 140 F.2d 250, 253-54 (4th Cir. 1944).

In *Michelson*, the Supreme Court relied on the case of *Edgington v. United States*, 164 U.S. 361, 366 (1896). That case disapproved an instruction to the effect that character evidence should be considered only if the other evidence created doubt. It did not hold that character evidence is so highly probative that it must always be singled out as

potentially exculpatory standing "alone." *Carbo v. United States*, 314 F.2d at 746. We believe the better view, which we think not foreclosed by *Michelson*, continues to be that expressed by this court in *Mannix* and followed by a majority of the circuits. We need not hold that an "alone" instruction could in no circumstances be a matter of right to find it not required in this case. Here defendants did not rely on character evidence alone for their defense. The instructions properly allowed the jury to consider it along with other evidence, and clearly did not suggest that the jury might not find in the character evidence "alone" a basis for reasonable doubt.

IV. Evidentiary Issues

Defendants John Foley and Jack Foley Realty, Inc. assert that the district court erred in admitting into evidence a letter written from a Foley vice president, John O'Keefe, to a homeowner whose house had been relisted at seven percent.[14]

During the grand jury investigation some of the records of Foley, Inc. were subpoenaed. While this letter was covered by the subpoena it was not produced. Shortly before trial, an attorney in a civil suit involving the same conspiracy called the United States Attorney and told him about the letter. The government asked the attorney for a copy of the letter, but since it was subject to a protective order in the civil suit, the attorney asked that the government obtain the letter directly from defendants. The letter was then so obtained. In ruling on the objection to the admission of the letter, Judge Blair assumed that it had been obtained in violation of the protective order. We make the same assumption.

The government is not precluded from introducing improperly obtained evidence so long as it did not participate

[14] *See* text accompanying note 4 *supra*.

in the impropriety. *Burdeau v. McDowell*, 256 U.S. 465, 476 (1921); *United States v. Francoeur*, 547 F.2d 891, 893 (5th Cir. 1977).[15] Judge Blair found that the government had not participated in the assumed violation of the protective order; that finding is not clearly erroneous.

Defendants seek to analogize the protective order to 47 U.S.C. § 605, a provision of the Federal Communications Act which they assert has been interpreted to prohibit the admission of communications seized in violation of its terms even absent government complicity. Assuming that defendants' construction were correct, a proposition which we do not accept save for the purposes of argument, *see Bubis v. United States*, 384 F.2d 643 (9th Cir. 1967) (allowing admission of communication seized in violation of § 605), we reject the analogy. Section 605 was obviously intended to further broader policies than is a protective order of the type here involved. No suggestion is made that the government has engaged in impermissible discovery, that defendants' privilege against self-incrimination has been violated[16] or that the admission of the letter occasioned prejudicial publicity. The letter was subject to a subpoena and should have been produced during the grand jury investigation. To allow its admission in a situation where the government did not act improperly would not frustrate any valid policy.

[15] This rule has developed in cases involving alleged constitutional improprieties so it may be said to be predicted on a lack of state action. On the other hand, the notion that the mere fact of impropriety should preclude admissibility has not been accepted. *See Burdeau v. McDowell*, 256 U.S. at 476-77 (Brandeis, J., dissenting). If impropriety of a constitutional dimension does not preclude admissibility about Government complicity, a more stringent rule in a non-constitutional setting would be inappropriate.

[16] The letter was neither the personal property of nor in the possession of Mr. Foley; Foley, Inc. has no privilege against self incrimination. *United States v. White*, 322 U.S. 694, 698-99 (1944).

Defendants object to the admission of a series of charts, designated Government Exhibits Numbers 39 through 51. Numbers 39 through 50 summarized the number of listings filed by each realtor with the multiple listing service and portrayed the percentage of those listings which were at the higher, seven percent commission rate. These charts were compiled by a Justice Department economist from data obtained from the multiple listing service. Defendants were apprised that the government intended to use a compilation of such data well before trial and the documents were available for inspection at the Justice Department throughout May and June 1977. Defendants complain, however, that the charts themselves were not made available until the weekend before trial.

Fed. R. Evid. 1006 provides: "The contents of voluminous writings . . . which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place." The data upon which these charts were based came from defendants own listing service, the documents were made available to defendants at the Justice Department well before trial and the charts themselves were provided the weekend before trial. Defendants complain that the charts should have been made available longer in advance of trial, relying on the last sentence of Rule 1006. That sentence refers to make available the original documents, not the charts themselves. 5 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 1006[04] at 1006-8 (1975). The charts themselves are not misleading and we cannot say Judge Blair abused his discretion in allowing their admission.

Government Exhibit No. 51 summarized the percentage of houses sold by each defendant which were purchased with loans guaranteed by the Veterans Administration or the Federal Housing Administration. Defendant Foley and

his firm complain that the base data for this chart was never made available to them. The chart was compiled from data contained in machine-readable "diskettes" provided by the multiple listing service. The diskettes were not made available to defendants, but a computer print-out of the information they contained was and the diskettes themselves only contained data that was provided to defendants themselves by their multiple listing service in the normal course of business. The computer print-outs qualify as duplicates of the diskettes within the meaning of Rule 1006. Fed. R. Evid. 1001(4). In any event, defendants conceded that substantial out-of-state funds were used to purchase houses they brokered. Thus, the admission of the chart, if erroneous, would seem to be harmless error.

Father Henry O'Meara testified to a number of versions of a conversation he had with John T. Carruthers concerning Robert Lebling's reluctance to take seven percent listings. Carruthers and Colquitt-Carruthers, Inc. contend that the trial court erred in failing to strike the testimony, apparently on the ground that the potential for confusion, due to the inconsistencies in the several versions as to what actually was said, outweighed any relevance the testimony had. The decision to strike testimony on grounds of lack of relevance is committed to the district judge. We cannot say he abused that discretion in this instance.

The same two defendants also object to the trial court's allowing Allyn Rickman to refresh his recollection concerning a conversation he had with Carruthers with a transcript of his previous grand jury testimony.[17] We cannot say that Judge Blair abused his discretion in concluding that Rickman's memory was exhausted, that the grand jury transcript would be helpful in refreshing it or that it was in fact refreshed.

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[17] *See* text accompanying note 5 *supra*.

Finally, Robert L. Gruen, Inc. complains that the government interfered with its cross-examination of Rickman by withholding discoverable information. Gruen was provided with the information that Rickman had told the government that he could not recall Robert Gruen saying at the dinner that his firm would go to seven percent. Gruen was not given the notes taken by a government attorney of the interview nor was it told that Rickman had said that he had the *impression* from the dinner that Gruen would go to seven percent. When Rickman testified that Gruen had said his firm would go to seven percent, Gruen attempted to impeach him with the prior inconsistent statement. Rickman stated that he could not recall having made the statement to the government. Gruen then sought production of the interview notes, but the government refused to allow the statement that Rickman could not recall Gruen saying he would go to seven percent to be used unless the statement that Rickman had the impression Gruen would go to seven percent was also admitted. In the end, the jury was apprised of both statements.

The interview notes were not verbatim nor had they been approved by Rickman. Thus they were not discoverable under the Jencks Act, 18 U.S.C. § 3500. Without reaching the question whether the failure to make a full disclosure of Rickman's statements violated the principle of *Brady v. Maryland*, 373 U.S. 83 (1963), we conclude that under the circumstances any error in this regard was harmless beyond a reasonable doubt. In the trial court's final working out of the awkwardness, the jury was apprised of the possibility that Rickman had given different versions of his recollection on the critical point. The essential impeachment purpose was thus served, and defendant's hurt is thus reduced essentially to tactical discomfiture of limited duration and impact. While even this could have been avoided by a more fully forthcoming disclosure by the Government, we cannot find in it error requiring reversal of these convictions.

Having carefully considered the record, the briefs and the oral arguments of all the parties we conclude that no reversible error has been made in the trial of this difficult and complicated case. The convictions of the nine defendants therefore are affirmed.

AFFIRMED.

EXHIBIT B

EXHIBIT B

U.S. DISTRICT COURT, DISTRICT OF MARYLAND.
CRIMINAL NO. B-77-0185. DATED JULY 29, 1977.

[¶ 61,678] UNITED STATES v. JACK FOLEY, INC., ET AL.

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Memorandum and Order

BLAIR, D. J.: In this criminal antitrust case, the government alleges that six real estate companies and three individuals conspired to fix, raise and maintain commission rates for sales of residential property located in Montgomery County, Maryland at seven percent in violation of section 1 of the Sherman Act. 15 U.S.C. § 1. All defendants, except for Schick & Pepe Realty, Inc., have moved to dismiss the indictment for lack of jurisdiction.

I.

Analysis begins with the proposition that jurisdiction under the Sherman Act is coterminous with the constitutional power of Congress to regulate commerce. *United States v. South-Eastern Underwriters Ass'n* [1944-1945 TRADE CASES ¶ 57,253], 322 U.S. 533, 558-59 (1944); see *United States v. American Bldg. Maintenance Indus.* [1975-1 TRADE CASES ¶ 60,365], 422 U.S. 271, 278 (1975); *Gulf Oil Corp. v. Copp Paving Co.* [1974-2 TRADE CASES ¶ 75,402], 419 U.S. 186, 194-95 (1974). In both civil and criminal actions under section 1 of the Sherman Act, it is a jurisdictional prerequisite that the acts constituting the violation be "in restraint of trade or commerce among the several States."[1] When determining whether conduct is within the

[1] The Supreme Court in *United States v. National Ass'n of Real Estate Bds.* [1950-1951 TRADE CASES ¶ 62,621], 339 U. S. 485 (1950), settled any question as to whether real estate brokerage is trade within the meaning of the Sherman Act. Refusing to exempt the real estate business from the coverage of the Act, the Court held that "[t]he competitive standards which the Act

ambit of the Sherman Act, courts have extended jurisdiction to include not only transactions in the stream of interstate commerce, but also to intrastate transactions which substantially affect interstate commerce. *Hospital Bldg. Co. v. Rex Hospital Trustees* [1976-1 TRADE CASES ¶ 60,885], 425 U.S. 738, 743-46 (1976); *United States v. Employing Plasterers Ass'n* [1954 TRADE CASES ¶ 67,692], 347 U.S. 186, 188-89 (1954); *United States v. Women's Sportswear Mfrs. Ass'n* [1948-1949 TRADE CASES ¶ 62,390], 336 U.S. 460, 464 (1949); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.* [1948-1949 TRADE CASES ¶ 62,251], 334 U.S. 219, 235-36 (1948); *United States v. South-Eastern Underwriters Ass'n* [1944-1945 TRADE CASES ¶ 57,253], 322 U.S. 533, 546-47 (1944). Whether or not activity is within the flow of interstate commerce or substantially affects interstate commerce is determined on a case by case evaluation of the relevant economic factors rather than by the "application of abstract or mechanistic formulae." *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.* [1948-1949 TRADE CASES ¶ 62-251], 334 U.S. 219, 232-33 (1948); *United States v. South-Eastern Underwriters Ass'n* [1944-1945 TRADE CASES ¶ 57,253], 322 U.S. 533, 546-47 (1944); *Doctors, Inc. v. Blue Cross* [1973-2 TRADE CASES ¶ 74,847], 490 F. 2d 48, 51 (3d Cir. 1973); *Rasmussen v. American Dairy Ass'n* [1973-1 TRADE CASES ¶ 74,313], 472 F. 2d 517, 523 (9th Cir. 1973). As a result, a court in each instance must employ the applicable precedents as guideposts to be used in judging the variables unique to each economic setting. *Doctors, Inc. v. Blue Cross* [1973-2 TRADE CASES ¶ 74,847], 490 F. 2d at 51; *Rasmussen v. American Dairy*

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sought to preserve in the field of trade and commerce seem as relevant to the brokerage business as to other branches of commercial activity." 339 U. S. at 492. Although *National Ass'n of Real Estate Bds.* is distinguishable from this case because it was brought under section 3 rather than section 1, the Court noted that "[n]o reason of policy has been advanced for reading § 3 of the Act less literally than its terms suggest." *Id.*

Ass'n [1973-1 TRADE CASES ¶ 74,313], 472 F. 2d at 526-27; see also *United States v. Finis P. Ernest, Inc.* [1975-1 TRADE CASES ¶ 60,135], 509 F. 2d 1256, 1258 (7th Cir. 1975).

Recognizing that jurisdiction exists if either the "in commerce" or the "affecting commerce" prong is satisfied; *Burke v. Ford* [1967 TRADE CASES ¶ 72,299], 389 U.S. 320, 321 (1967) (per curiam), defendants argue that sales of real estate in Montgomery County, Maryland are not within the flow of interstate commerce and that the indictment [2]

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[2] The indictment charges that the defendants' activities, as they relate to the trade or commerce among the state's requirement of section 1, are as follows:

"5. The activities of defendant corporations, as hereinafter described, are within the flow of interstate commerce and have an effect on that commerce.

"6. For a commission or fee, real estate brokerage firms such as defendant corporations render the service of bringing together buyers and sellers of residential real estate and of negotiating and arranging the prices and terms of residential real estate sales in Montgomery County. Thousands of parcels of residential real estate are listed with and sold through Montgomery County brokerage firms each year. In the period January 1974 through October 1975, defendant corporations handled sales of residential real estate in Montgomery County totaling more than $350 million.

"7. Because of the transient nature of a significant portion of the population of the Metropolitan Washington, D. C. area, of which Montgomery County is a part, a substantial number of the persons using the services of defendant corporations in connection with residential real estate sales are persons moving into Montgomery County from places outside the State of Maryland and persons moving from Montgomery County to places outside the State of Maryland. Many Montgomery County brokers, including several of the defendant corporations, belong to nationwide referral services through which they receive and transmit to brokers in other parts of the county referrals of buyers and sellers of residential real estate.

"8. As part of their service, defendant corporations advertise their listings of residential real estate located in Montgomery County in newspapers located outside the State of Maryland and whose circulations cover other states and the District of Co-

fails to allege facts sufficient to show that sales of real estate have a substantial effect on interstate commerce. The allegations in the indictment for purpose of the motion to dismiss are presumed to be true. *United States v. Frankfort Distilleries, Inc.* [1944-1945 TRADE CASES ¶ 57,338], 324 U.S. 293, 296 (1945).

The authorities are inconclusive on the question of whether an alleged conspiracy by real estate brokers to fix commission rates is within the flow of interstate commerce. The Supreme Court did not consider the issue in the only Sherman Act case to reach the Court involving the real estate business. *United States v. National Ass'n of Real Estate Bds.* [1950-1951 TRADE CASES ¶ 62,621], 339 U.S. 485 (1950), was a case brought under section 3 of the Sherman Act which is applicable only to restraints of trade in the District of Columbia and the Court did not face an interstate commerce question. 339 U.S. at 492. One court has suggested that *National Ass'n of Real Estate Bds.* supports the defendants' position that real estate brokers are not within the stream of interstate commerce. *Hill v. Art Rice Realty Co.* [1974-2 TRADE CASES ¶ 75,364], 66 F. R. D. 449, 454 (N. D. Ala. 1974), aff'd, 511 F. 2d 1400 (5th Cir. 1975). Defendants rely upon *Marston v. Ann Arbor Property Managers (Management) Ass'n* [1969 TRADE CASES ¶ 72,862], 302 F. Supp. 1276 (E. D. Mich. 1969), aff'd [1970 TRADE

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lumbia. Such advertising is intended to and does attract buyers from outside the State of Maryland.

"9. As an additional part of their service, defendant corporations often assist their clients in securing financing necessary for the purchase of residential real estate in Montgomery County. A substantial amount of the funds used in financing residential sales handled by defendant corporations moves into the State of Maryland in interstate commerce from other states. In addition, substantial amounts of such funds are guaranteed under programs of the Veterans Administration and the Department of Housing and Urban Development, both of which are agencies of the federal government headquartered in the District of Columbia."

CASES ¶ 73,082], 422 F. 2d 836 (6th Cir. 1970), and *Cotillion Club v. Detroit Real Estate Bd.* [1969 TRADE CASES ¶ 72,894], 303 F. Supp. 850 (E. D. Mich. 1964), in support of their position. *Marston* was a private Sherman Act suit in which the defendants were alleged to have fixed apartment rental rates and controlled the supply of new apartments in the Ann Arbor housing market. 302 F. Supp. at 1279. The court found that neither the construction of apartments with material received through interstate shipments nor the fact that out-of-state students would be among the tenants of the apartments operated to transform wholly local commerce into interstate commerce sufficient to satisfy the first prong of the test for the Sherman Act jurisdiction. 302 F. Supp. at 1279-80. Finding that the interstate activity had only an incidental effect on interstate commerce, the court dismissed the complaint for lack of jurisdiction. 302 F. Supp. at 1280. The *Marston* court relied in part on *Cotillion Club, Inc. v. Detroit Real Estate Bd., supra,* where the plaintiffs alleged that defendants conspired to exclude blacks from membership and prevent blacks from purchasing homes in designated neighborhoods in the Detroit area. The court found that the "in commerce" prong was not satisfied stating:

> It is clear from the complaint in this case that the restraints alleged relate only to the purchase and sale of real estate in the Detroit Metropolitan Area. It is competition for the purchase and sale of this real estate which is assertedly injured by the alleged restraints. This is local commerce and the competition allegedly restrained and interfered with is local in nature.

303 F. Supp. at 854. The court also found that the activity was purely intrastate with only incidental impact on interstate commerce and dismissed the Sherman Act claims. 303 F. Supp. at 855-56. See also *Gateway Associates, Inc. v. Essex Costello, Inc.* [1974-2 TRADE CASES ¶ 75,231], 380 F. Supp. 1089, 1093-94 (N. D. Ill. 1974).

In *Mazur v. Behrens*, [1974-1] TRADE REGULATION REPORTS (CCH) ¶ 75,070 (N. D. Ill. 1972), however, the court, without citation to either *Marston* or *Cotillion*, found that the defendant real estate brokers and two of their associations were engaged in interstate commerce based, in part, on a showing that some of the defendants represented out-of-state sellers and buyers in forty percent of their transactions and the defendants advertised and solicited buyers outside of Illinois. Compare Indictment ¶ 7 and 8, footnote 2 *supra*. The court did not consider the second prong of the test because "the defendants are clearly engaged in interstate commerce." [1974-1] TRADE REGULATION REPORTS at 96,788. The court in *United States v. Atlanta Real Estate Bd.*, [1972] TRADE REGULATION REPORTS (CCH) ¶ 73,825 (N. D. Ga. 1971), denied a motion to dismiss for lack of jurisdiction in a private Sherman Act case because the jurisdictional facts were intertwined with the facts which went to the merits. The court distinguished both *Marston* and *Cotillion*, the former on the ground that it involved students seeking relief as tenants and the latter because there was no indication that it was as factually complex as the case before the court. [1972] TRADE REGULATION REPORTS at 91,482. See also *Oglesby & Barcliff, Inc. v. Metro MLS, Inc.*, [1976-2] TRADE REGULATION REPORTS (CCH) ¶ 61,064 at 69,796-97 (E. D. Va. 1976); *United States v. Metro MLS, Inc.*, [1974-2] TRADE REGULATION REPORTS (CCH) ¶ 75,311 at 97,998-99 (E. D. Va. 1973). The court need not decide whether defendants' activities are "within the flow of interstate commerce," because the discussion will show that even if the activities are assumed to be wholly intrastate, they nevertheless have a substantial effect on interstate commerce and therefore are within the scope of Sherman Act jurisdiction. See *Mortensen v. First Federal Savings & Loan Assn* [1977-1 TRADE CASES ¶ 61,259], 549 F. 2d 884, 896 (3d Cir. 1977); *Evans v. S. S. Kresge Co.* [1976-2 TRADE CASES ¶ 61,148], 544 F. 2d 1184, 1188 & n. 16 (3d Cir. 1976).

Whether or not defendants' alleged restraint of the Montgomery County, Maryland real estate business, which is assumed to be wholly intrastate, substantially affects interstate commerce requires the exercise of a practical economic judgment because, as the Third Circuit has noted, the "affecting commerce test" is not a test at all but is only a guide to the solution to the problem: See *Doctors, Inc. v. Blue Cross* [1973-2 TRADE CASES ¶ 74-847], 490 F. 2d 48, 51 (3d Cir. 1973). Acknowledging the answer in each case is one of degree which necessarily yields imprecise results, the Ninth Circuit has stated:

> There is no bright line dividing cases in which the effect upon interstate commerce is sufficient to permit Congress to prohibit particular anticompetitive activity under the commerce clause from those cases in which it is not sufficient. In this area perhaps more than in most, each case must turn on its own facts.

Rasmussen v. American Dairy Ass'n [1973-1 TRADE CASES ¶ 74,313], 472 F. 2d 517, 526 (9th Cir.), cert. denied, 412 U. S. 950 (1973); see *Evans v. S. S. Kresge Co.* [1976-2 TRADE CASES ¶ 61,148], 544 F. 2d 1184, 1188 (3d Cir. 1976).

Although both the government and defendants rely on *Goldfarb v. Virginia State Bar* [1975-1 TRADE CASES ¶ 60,355], 421 U. S. 773 (1975), they have diametrically opposed positions on the result which the opinion portends. The government asserts that *Goldfarb* is so factually similar to this case that it is conclusive on the jurisdictional issue. Defendants, on the other hand, argue that *Goldfarb* is factually distinguishable and, seizing upon language in the opinion, assert that *Goldfarb* requires dismissal because the real estate activities involved are not necessary, essential or inseparable components of any interstate transactions. See *Goldfarb v. Virginia State Bar* [1975-1 TRADE CASES ¶ 60,355], 421 U. S. at 783-86. The thrust of defendants' argument is that before jurisdiction can exist the court must find that the intrastate activities not only sub-

stantially affect interstate commerce but that they are also integral parts of general interstate transactions. The test suggested by defendants is not a radical or fundamental departure from prior court decisions, rather it is a restatement, couched in *Goldfarb's* positive language, of the well settled proposition that mere incidental, inconsequential, remote or fortuitous effects on interstate commerce are insufficient to sustain jurisdiction under the Sherman Act. See e. g., *Sun Valley Disposal Co. v. Silver State Disposal Co.* [1970 TRADE CASES ¶ 73,009], 420 F. 2d 341, 343 (9th Cir. 1969); *Lieberthal v. North Country Lanes, Inc.* [1964 TRADE CASES ¶ 71,108], 332 F. 2d 269, 272 (2d Cir. 1964); *Page v. Work* [1961 TRADE CASES ¶ 69,956], 290 F. 2d 323 (9th Cir. 1961).

In their effort to show that their activities have only an insubstantial effect on interstate commerce, defendants isolate each of those activities which allegedly contributes to the effect on interstate commerce.

The indictment alleges that during the period January 1974 through October 1975 the defendant corporations sold real estate valued in excess of $350 million to a substantial number of persons who moved to Montgomery County from locations outside of Maryland. The indictment also alleges that some of the defendants utilize and belong to nationwide referral services in connection with the sale of residential property. Defendants rely on *Marston v. Ann Arbor Property Managers (Management) Ass'n* [1969 TRADE CASES ¶ 72,862], 302 F. Supp. 1276 (E. D. Mich. 1969), and *Diversified Brokerage Services, Inc. v. Greater Des Moines Board of Realtors* [1975-2 TRADE CASES ¶ 60,443], 521 F. 2d 1343 (8th Cir. 1975), in support of their argument that the interstate movement of buyers into Montgomery County is not affected by the alleged conspiracy. Neither case involved allegations so similar to those in the indictment to require dismissal. The charges in the indictment differ significantly from *Marston* where

a limited number of out-of-state college students were the persons in interstate transit. In *Diversified Brokerage,* plaintiffs attempted to establish jurisdiction only under the "in commerce" theory and when the evidence failed to support jurisdiction, the district court dismissed the complaint. The Eighth Circuit affirmed but carefully circumscribed its holding, stating:

> We emphasize the limited nature of our holding. Services affecting real estate, such as brokerage services, may, depending upon the evidence presented, either constitute interstate activities or have no nexus with interstate commerce and thus be beyond the reach of the Sherman Act. . . . In the instant case, plaintiffs presented extremely limited evidence and failed to show any interstate character to these real estate transactions. Additionally, plaintiffs chose not to attempt to show that the intrastate activities of defendants placed any substantial burden on interstate commerce.

521 F. 2d at 1347 (citation omitted). Rather than the five out-of-state purchasers found in *Diversified Brokerage,* the indictment alleges that a substantial number of the persons purchasing real estate sold by the defendants were from outside of Maryland. Further, the indictment alleges that defendants advertise their listings in newspapers with interstate circulation in order to attract those buyers. *Cf. Diversified Brokerage* [1975-2 TRADE CASES ¶ 60,443], 521 F. 2d at 1346-47.

The indictment alleges that the defendant corporations assist their clients in securing substantial amounts of financing from private governmental institutions located outside of Maryland. Defendants posit that defendants' financing related activities should be viewed as services which only incidentally happen to cross state lines, having insubstantial effect on interstate commerce. In support of their position, defendants cite *Cotillion Club, Inc. v. Detroit*

Real Estate Bd. [1969 TRADE CASES ¶ 72,894], 303 F. Supp. 850 (E. D. Mich. 1964), where the court found that transmittal of documents related to financing to federal agencies was an incidental activity crossing state lines which did not support jurisdiction under the "affecting commerce" theory. The *Cotillion Club* allegations are distinguishable from those in the indictment. First, the documents in *Cotillion Club* were alleged to have been sent not by the defendant real estate associations but by the individual real estate brokers, brokers such as those indicted here. Second, this indictment alleges that the defendants' activities are substantial in relation to the value of the real estate. Finally, all of the allegations in the indictment relate specifically to the defendants and not to some other group or association. *Cf. Cotillion Club* [1969 TRADE CASES ¶ 72,894], 303 F. Supp. at 853. If the only nexus between defendants' real estate business and interstate commerce were the filing of financing documents, then the answer to the question before the court might be different.

This, however, is simply not the case. The defendants, six corporations and three individuals, are alleged to have engaged in a conspiracy to fix and maintain real estate commissions between September 1974 and April 1977. The six corporations allegedly sold real estate valued in the millions of dollars during a twenty-two month period in Montgomery County, one of the suburban Maryland counties contiguous with Washington, D. C. The indictment alleges that a substantial number of the purchasers were persons moving in or out of Montgomery County, persons who may have learned of the defendants' services either through advertisements the defendants placed in newspapers with interstate circulation or because of their membership in nationwide referral services. The indictment further alleges that a component of the defendants' services is assisting purchasers in securing financing from governmental and private institutions located outside of Maryland.

Standing alone, it may be that no single part of the defendants' real estate business has a sufficient nexus to cause their activities to fall under the Sherman Act. The court, however, does not look at each of those components of defendants' services as separate and discrete entities, divorced from the context in which those activities occur. Rather, the court must analyze the totality of the activities, in relation to the violations charged, to determine whether in the aggregate those activities have a substantial effect on interstate commerce. This is not a case in which two real estate brokers in a small rural community, who advertise only in a local newspaper, who do not belong to any national or regional listing services, and who leave arrangement of financing to lending institutions are charged with fixing commission rates. As alleged, the defendants are instead companies and businessmen who conduct multimillion dollar operations, who are located in a large expanding metropolitan area and whose services are used by buyers and sellers moving into and out of Maryland, who assist in arranging financing of residential properties sold with governmental and lending agencies outside of Maryland, who attract purchasers through the use of multistate referral services, and who advertise their brokerage business interstate. From these allegations, the court concludes that the indictment adequately charges that the defendants' activities have a substantial effect on interstate commerce and that the motions to dismiss for lack of jurisdiction should be denied.[3]

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[3] Defendants have cited *McLain v. Real Estate Bd. of New Orleans, Inc.* [1977-1] TRADE REGULATION REPORTS (CCH) ¶ 61,486 (E. D. La. 1977), appeal docketed, No. 77-2423 (5th Cir. June 24, 1977), in support of their contention that the court is without jurisdiction to try this action. As noted before, each case involving Sherman Act jurisdiction turns on its own peculiar facts and *McLain* is, therefore, one example of a district court's exercise of its economic judgment. To the extent, however, that *McLain* is factually indistinguishable from the allegations here, this court feels that an overly restrictive jurisdictional standard was used

II.

Defendant Robert L. Gruen, Inc. [Gruen] has moved to dismiss the indictment on three additional grounds. Gruen argues (1) that section 1 of the Sherman Act, 15 U.S.C. § 1, as a felony statute, is unconstitutionally vague on its face and as applied to it; (2) that section 1 violates the due process clause of the fifth amendment by imposing felony penalties without requiring that specific intent be an element of the offense; and (3) that the indictment itself is impermissibly vague in violation of its rights under the fifth and sixth amendments and Federal Rule of Criminal Procedure 7(c)(1).

Gruen argues that the amendments to section 1, which increase the penalties for violations of the Sherman Act, require the court to judge the statute by stricter standards than previously. Citing *Winters v. New York,* 333 U.S. 507, 515 (1948), where the Court stated:

> The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime "must be defined with appropriate definiteness." (citation omitted).

Gruen contends that the language of section 1 does not provide adequate notice of the conduct which it prohibits and is thereupon unconstitutionally vague. The restraint of trade defendants are alleged to have engaged in its price-

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by the district court. See *Mims v. Kemp* [1975-1 TRADE CASES ¶ 60,334], No. 74-1379 (4th Cir., filed May 12, 1975); *A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Ass'n* [1973-1 TRADE CASES ¶ 74,582], 484 F. 2d 751, 758 (7th Cir. 1973), cert. denied, 414 U. S. 931 (1974). *Cf. Gateway Associates, Inc. v. Essex-Costello, Inc.* [1974-2 TRADE CASES ¶ 75,231], 380 F. Supp. 1089, 1092-94 (N. D. Ill. 1974).

fixing, which has long been held to be a *per se* [4] violation of the Sherman Act. *United States v. Socony-Vacuum Oil Co.,* [1940-1943 TRADE CASES ¶ 56,031], 310 U.S. 150, 210 (1940); *Northern Pac. Ry. Co. v. United States* [1958 TRADE CASES ¶ 68,961], 356 U.S. 1, 5 (1958). The Court in *Winters v. New York,* 333 U.S. 507, 515 (1948), stated that "[m]en of common intelligence cannot be required to guess at the meaning of the enactment." The Court's qualification of that statement is particularly appropriate to this case:

> *Connally v. General Construction Co.,* 269 U.S. 385, 391-92 [1926]: But it will be enough for present purposes to say generally that the decision of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases, having a technical of other special meaning, well enough known to enable those within their reach to correctly apply them, . . . or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, . . . or, as broadly stated by Mr. Chief Justice White in *United States v. Cohen Grocery Co.,* 255 U.S. 81, 92, that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.

333 U.S. at 515 n.4; see *Parker v. Levy,* 417 U.S. 733, 754 (1972). The Court in *United States v. National Dairy Corp.* [1963 TRADE CASES ¶ 70,666], 372 U.S. 29 (1963), discussed the void for vagueness doctrine in the context of an indictment brought under the Robinson-Patman Act:

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[4] See *United States v. Topco Associates, Inc.* [1972 TRADE CASES ¶ 73,904], 405 U. S. 596 (1972), where the Court stated:

"Without the *per se* rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act." 405 U.S. at 609-10 n. 10.

> Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. . . . In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged.

372 U.S. at 32-33 (citations omitted). *Nash v. United States*, 229 U.S. 373 (1913), upheld the constitutionality of the Sherman Act, as a misdemeanor, in the face of a void for vagueness challenge. 229 U.S. at 377-78. The illegality of price-fixing has remained unchanged since *Nash* and the mere increase in the criminal penalties does not cause a formerly constitutional statute to become unconstitutional.

Gruen next argues that the increased penalties carry an additional requirement—that the indictment charge that the defendants acted with specific intent. The Supreme Court in *United States v. Patten*, 226 U.S. 525 (1913), held:

> [T]hat there was no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion, for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts, and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result.

226 U.S. at 543; *Anderson v. Shipowner's Ass'n*, 272 U.S. 359, 363 (1926). The congressional determination to increase the magnitude of the penalties for antitrust offenses was a recognition that the then current penalties were no longer commensurate with the severity of the offense. H. Rep. No. 93-1463, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News, 9535, 9540. Congress, however, did not

amend section 1 of the Sherman Act to require specific intent and this decision was well within its legislative prerogative. The Constitution does not mandate a different result and the court finds that section 1 of the Sherman Act, as amended, does not violate defendants' due process rights.

Gruen's final argument is that the indictment fails to delineate with specificity the precise charges against the defendants, violating the fifth and sixth amendments and Federal Rule of Criminal Procedure 7(c)(1). Read as a whole, it is clear that the indictment states facts sufficient to constitute an offense. The allegation of a combination in restraint of trade suffices to state the offense (¶ 10-11); the involvement of the defendants in that offense is sufficiently stated (¶ 12); and the jurisdictional element adequately alleged (see Section I *supra*). *United States v. Container Corp.* [1969 TRADE CASES ¶ 72,675], 393 U.S. 333, 335 (1969); *United States v. Socony-Vacuum Oil Co.* [1940-1943 TRADE CASES ¶ 56,031], 310 U.S. 150, 221-25 (1940). The sufficiency of the indictment is not to be confused with the possible need for a bill of particulars. See *Frankfort Distilleries v. United States* [1944-1945 TRADE CASES ¶ 57,286], 144 F.2d 824, 831 (10th Cir. 1944), rev'd on other grounds [1944-1945 TRADE CASES ¶ 57,338], 324 U.S. 293 (1945).

Accordingly, it is this 29th day of July, 1977, Ordered that defendants' motions to dismiss be, and the same hereby are, Denied.

EXHIBIT C

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No.: 77-0185

UNITED STATES OF AMERICA,

v.

JACK FOLEY REALTY, INC.; BOGLEY, INC.; COLQUITT-CARRUTHERS, INC.; ROBERT L. GRUEN, INC.; SCHICK & PEPE REALTY, INC.; SHANNON & LUCHS CO.; JOHN P. FOLEY, JR.; JOHN T. CARRUTHERS, JR.; and ROBERT W. LEBLING, *Defendants.*

Indictment

Filed 4/1/77

The grand jury charges:

I

DEFINITION

1. As used herein, the term "residential real estate" does not include new homes sold on behalf of their builders or developers.

II

DEFENDANTS

2. Each of the corporations named below in this paragraph is hereby indicted and made a defendant herein. Each of said defendants is incorporated and exists under the laws of the state listed opposite its name, with its principal place of business at the place listed. During all or part of the period of time covered by this indictment, each of said

corporations has been engaged in the real estate brokerage business in Montgomery County, Maryland.

Name of Corporation	State of Incorporation	Principal Place of Business
Jack Foley Realty, Inc.	Maryland	Bethesda, Maryland
Bogley, Inc.	Maryland	Chevy Chase, Maryland
Colquitt-Carruthers, Inc.	Maryland	Bethesda, Maryland
Robert L. Gruen, Inc.	Maryland	Silver Spring, Maryland
Schick & Pepe Realty, Inc.	Maryland	Wheaton, Maryland
Shannon & Luchs Company	Delaware	Washington, D.C.

3. Each of the individuals named below in this paragraph is hereby indicted and made a defendant herein. Each of said defendants, during all or part of the period of time covered by this indictment, has been associated with the designated defendant corporation in the capacity indicated.

Name of Defendant	Corporation	Position
John P. Foley, Jr.	Jack Foley Realty, Inc.	President
John T. Carruthers, Jr.	Colquitt-Carruthers, Inc.	President
Robert W. Lebling	Bogley, Inc.	President

III

CO-CONSPIRATORS

4. Various corporations and individuals not made defendants herein have participated as co-conspirators with the defendants in the offense alleged herein, and have performed acts and made statements in furtherance thereof.

IV

TRADE AND COMMERCE

5. The activities of defendant corporations, as hereinafter described, are within the flow of interstate commerce and have an effect on that commerce.

6. For a commission or fee, real estate brokerage firms such as defendant corporations render the service of bringing together buyers and sellers of residential real estate and of negotiating and arranging the prices and terms of residential real estate sales in Montgomery County. Thousands of parcels of residential real estate are listed with and sold through Montgomery County brokerage firms each year. In the period January 1974 through October 1975, defendant corporations handled sales of residential real estate in Montgomery County totaling more than $350 million.

7. Because of the transient nature of a significant portion of the population of the Metropolitan Washington, D.C. area, of which Montgomery County is a part, a substantial number of the persons using the services of defendant corporations in connection with residential real estate sales are persons moving into Montgomery County from places outside the State of Maryland and persons moving from Montgomery County to places outside the State of Maryland. Many Montgomery County brokers, including several of the defendant corporations, belong to nation-wide referral services through which they receive and transmit to brokers in other parts of the country referrals of buyers and sellers of residential real estate.

8. As part of their service, defendant corporations advertise their listings of residential real estate located in Montgomery County in newspapers located outside the State of Maryland and whose circulations cover other states and the District of Columbia. Such advertising is intended

to and does attract buyers from outside the State of Maryland.

9. As an additional part of their services, defendant corporations often assist their clients in securing financing necessary for the purchase of residential real estate in Montgomery County. A substantial amount of the funds used in financing residential sales handled by defendant corporations moves into the State of Maryland in interstate commerce from other states. In addition, substantial amounts of such funds are guaranteed under programs of the Veterans Administration and the Department of Housing and Urban Development, both of which are agencies of the federal government headquartered in the District of Columbia.

V

OFFENSE

10. Beginning in or about the month of September 1974, and continuing thereafter until the date of the return of this indictment, the defendants and co-conspirators have engaged in a continuing combination and conspiracy in unreasonable restraint of the aforesaid trade and commerce, in violation of Section 1 of the Sherman Act, as amended (15 U.S.C. § 1).

11. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which have been to fix, raise and maintain commission rates for the sale of residential real estate in Montgomery County.

12. In effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which they combined and conspired to do, including, among other things, the following:

(a) communicated to one another at a meeting and on other occasions the intention to raise commission rates to 7 percent on listings of residential real estate in Montgomery County; and

(b) jointly adopted a policy of increasing commission rates on listings of residential real estate in Montgomery County to 7 percent.

VI

EFFECTS

13. The aforesaid combination and conspiracy has had the following effects, among others:

(a) commission rates on listings of residential real estate in Montgomery County have been fixed, raised and maintained at artificial and non-competitive levels;

(b) price competition among the defendants and co-conspirators in the sale of their services has been restrained; and

(c) sellers of residential real estate in Montgomery County have been deprived of free and open competition in the sale of real estate brokerage services.

VII

JURISDICTION AND VENUE

14. The aforesaid combination and conspiracy has been carried out in part within the District of Maryland within the five years preceding the return of this indictment.

A TRUE BILL

Foreman

/s/ DONALD I. BAKER
Donald I. Baker
Assistant Attorney General

/s/ WILLIAM E. SWOPE
William E. Swope

/s/ JOHN W. POOLE, JR.
John W. Poole, Jr.
Attorneys, Department of Justice

Jervis S. Finney
United States Attorney

/s/ CHARLES S. STARK
Charles S. Stark

/s/ LARRY S. GANGNES
Larry S. Gangnes

Attorneys, Department of Justice
Antitrust Division
Washington, D.C. 20530
Telephone: (202) 739-3200

Nos. 78-1737, 78-1838 and 79-93

Supreme Court, U.S.
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AUG 29 1979
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In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN P. FOLEY, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ROBERT L. GRUEN, INC., PETITIONER

v.

UNITED STATES OF AMERICA

SHANNON & LUCHS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

JOHN H. SHENEFIELD
Assistant Attorney General

ROBERT B. NICHOLSON
MARGARET G. HALPERN
Attorneys
Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1978

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UNITED STATES OF AMERICA

No. 78-1838

ROBERT L. GRUEN, INC., PETITIONER

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UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a)[1] is reported at 598 F. 2d 1323. The district court's memorandum and order denying petitioners' motion to dismiss (Pet. App. 31a-45a) is unreported.

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[1]Unless otherwise noted, "Pet." references are to the petition in No. 78-1737.

JURISDICTION

The judgments of the court of appeals were entered on April 19, 1979. The petition for a writ of certiorari in No. 78-1737 was filed on May 18, 1979. The petition for a writ of certiorari in No. 78-1838 was filed on June 8, 1979, and is therefore out of time under Rule 22(2) of the Rules of this Court. A petition for rehearing by Shannon & Luchs was denied on June 19, 1979 (79-93 Pet. App. 1a), and the petition for a writ of certiorari in 79-93 was filed on July 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the price-fixing activities of real estate brokers located in Montgomery County, Maryland, are within the reach of the Sherman Act as activities "in restraint of trade or commerce among the several States * * *." 15 U.S.C. 1.

2. Whether the district court properly instructed the jury on the degree and nature of criminal intent necessary to support a conviction under Section 1 of the Sherman Act.

STATEMENT

On April 1, 1977, a federal grand jury in Maryland charged six corporations and three individuals with violating Section 1 of the Sherman Act, 15 U.S.C. 1, by conspiring to raise real estate brokerage commission rates on the sale of homes in Montgomery County, Maryland, from six to seven percent. After a jury trial in the United States District Court for the District of Maryland, the defendants were convicted and sentenced to suspended prison terms and fines.[2] The court of appeals affirmed (Pet. App. 1a-29a).

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[2]Petitioners are two of the individual defendants and four of the corporate defendants.

1. Prior to September 1974, the prevailing real estate commission on the sale of residential property in Montgomery County, Maryland, was six percent (Pet. App. 3a). Although several petitioners were dissatisfied with this rate and desired to raise it to seven percent, they feared that they would lose business to competitors who continued to charge six percent (*id.* at 13a). Petitioner Foley, in particular, entertained this fear (J.A. 657).[3] Therefore, before raising his commission rate to seven percent, he invited executives of several of his largest competitors to a dinner at Congressional Country Club to discuss "something of great importance to the real estate industry" (J.A. 126). Nine persons attended this dinner, including petitioners Foley and Carruthers and executives of petitioners Robert L. Gruen, Inc., and Shannon & Luchs Co. The "something of great importance" turned out to be a discussion of real estate commission rates and an agreement to raise them to seven percent.

Petitioner Foley opened the discussion by announcing his intention to raise his prices to seven percent (Pet. App. 4a). The group then discussed the commission rate and, as petitioner Shannon & Luchs' vice-president put it, "I wouldn't say that the comments were purely innocent" (J. A. 333). The several real estate executives questioned each other as to their intentions with regard to raising commission levels. Executives of petitioners Colquitt-Carruthers, Inc. and Robert L. Gruen, Inc., as well as other persons, stated that they would raise their commissions to seven percent (Pet. App. 15a, 18a). Petitioner Shannon & Luchs' vice-president, noting that his firm was frequently a target of government antitrust

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[3]"J.A." refers to the Joint Appendix in the court of appeals.

investigations, said that its commission rate would probably go to seven percent but would not be raised until a later date (*id.* at 17a).[4]

Following the dinner, the several realty firms raised their commission rates from six to seven percent for most—and in some cases essentially all—of their sales (Pet. App. 4a). Petitioners Carruthers and Foley thereafter encouraged their fellow realtors to keep the rates up, telling them that it would be a mistake not to stay at seven percent and that price competition would prevent any of them from maintaining the more profitable seven percent rate (*id.* at 14a-16a).[5] In short, the evidence at trial amply proved a classic price-fixing conspiracy.

2. Petitioners moved to dismiss the indictment, contending that their activity was outside the scope of the Sherman Act because real estate sales are not in, and do not substantially affect, interstate commerce. The district court denied the motion, holding that petitioners' substantial involvement in interstate transactions and sales brings their conduct within the reach of the Sherman Act (Pet. App. 41a):

> [Petitioners] are * * * companies and businessmen who conduct multimillion dollar operations, who are located in a large expanding metropolitan area and whose services are used by buyers and sellers moving into and out of Maryland, who assist in arranging financing of residential properties sold with governmental and lending agencies outside of Maryland, who attract purchasers through the use of multistate referral services, and who advertise their brokerage business interstate.

[4]In fact Shannon & Luchs did raise its rate in January 1975 (Pet. App. 17a).

[5]For example, Carruthers telephoned an executive of Shannon & Luchs to complain that that firm was taking six percent listings at its Gaithersburg office. The executive acknowledged that there was a "problem" in Gaithersburg but assured Carruthers that he was "working" on it (Pet. App. 18a; J.A. 175-176).

The court of appeals upheld the denial of this motion. It noted that the record revealed that petitioners operate within "a substantial interstate market" (Pet. App. 11a) for real estate in the Washington, D.C. area, that petitioners engaged in extensive interstate advertising of their services, attracted out-of-state buyers by participation in national relocation services, and assisted buyers in obtaining out-of-state loans, and that a substantial portion of petitioners' sales involved persons moving into or out of the state (*id.* at 9a-12a).

ARGUMENT

1. Petitioners contend that their activity falls outside the scope of the Sherman Act because real estate sales are not in, and do not substantially affect, interstate commerce. This contention was properly rejected by both courts below (Pet. App. 5a-12a, 41a). The court of appeals correctly observed (*id.* at 11a, quoting *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 784 (1975)) that "[t]he overall picture that emerges [from the evidence] is one of a substantial stream of interstate commerce in which these brokers' activities were not only an 'integral part,' but in practical effect the dominant factor in * * * creating a substantial interstate market * * *." For the reasons elaborated in the decision of the court of appeals and in the brief of the United States as *amicus curiae* in *McLain* v. *Real Estate Board of New Orleans, Inc.*, cert. granted, No. 78-1501 (May 14, 1979), petitioners' real estate activities fall within the scope of the Sherman Act as activities in, and substantially affecting, interstate commerce.[6]

[6]We are providing petitioners with a copy of our *amicus* brief in *McLain*.

We note, however, that the question raised by petitioners in this case is essentially identical to the question presented in *McLain*, which the Court will consider in the 1979 Term. The question whether real estate brokerage activities substantially affect commerce was decided in *McLain* on a motion to dismiss on the pleadings rather than on a complete factual record. While the Court may wish to defer disposition of this petition pending its decision in *McLain*, we submit that the detailed record in this case amply supports the lower courts' conclusion that petitioners' real estate activities have a substantial effect on interstate commerce.[7]

2. a. Petitioners in No. 78-1737 contend (Pet. 15-16) that the record in this case does not reflect an intent to restrain trade but reveals only "self-regarding but independent decisions" to raise commission levels. This claim is merely a challenge to the sufficiency of the evidence that petitioners agreed to fix the price at which they would offer their services. This factual contention was properly rejected by the court of appeals (Pet. App. 12a-20a) and does not warrant further review.

b. Petitioners in No. 78-1737 contend that a conviction for violation of Section 1 of the Sherman Act requires a showing of "specific intent" to violate the law (Pet. 13-14). This contention is insubstantial.

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[7]We disagree with petitioners' suggestion (79-93 Pet. 15) that this case should be considered for review along with *McLain*. In our brief as *amicus curiae* in *McLain* we noted (Br. 15) that that case concerned the failure of the courts to allow the plaintiff an opportunity to prove his allegations at trial. It is unnecessary to review a lengthy factual record, such as this case possesses, to conclude in *McLain* that the allegation that real estate brokerage activity substantially affects commerce is not so frivolous as to warrant dismissal for lack of subject matter jurisdiction under the Sherman Act (see *ibid.*).

As this Court held in *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), a showing that antitrust conspirators acted with a specific desire "to violate the law would seem * * * both unnecessarily cumulative and unduly burdensome." *Id.* at 446. It is instead sufficient to show that the unlawful action was undertaken "with knowledge of its probable [anti-competive] consequences * * *." *Id.* at 448.[8] This requirement was fulfilled in this case by the trial court's instruction that the jury could convict the defendants only if it found beyond a reasonable doubt that they knowingly entered into an agreement the objective of which was to "fix, raise and maintain real estate commission rates * * * in Montgomery County, Maryland * * *" (J.A. 915).[9]

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[8]Petitioners suggest (Pet. 13-14) that because a violation of Section 1 is now a felony rather than a misdemeanor, "specific intent" to violate the law must be shown even though it was not previously required by this Court in *Gypsum*. But in *Gypsum* the Court was well aware that the Antitrust Penalties and Procedures Act of 1974 had made violation of Section 1 a felony (see 438 U.S. at 442 n.18), yet it concluded nonetheless that specific intent to violate the law need not be shown. This conclusion is supported by the fact that Congress, in enacting the 1974 Act, did not make any change in the substantive provisions of the Sherman Act but merely sought to increase penalties for violations (Pet. App. 21a). See, *e.g.*, 120 Cong. Rec. 36340 (1974) (remarks of Rep. Hutchinson). Accord, *United States* v. *Brighton Building & Maintenance Co.*, No. 77-2295 (7th Cir. June 7, 1979), pets. for cert. pending, Nos. 78-1872 and 79-111.

[9]The court instructed the jury that the offense charged (J.A. 915, 908-909)

> is that the Defendants entered into a combination and conspiracy to fix, raise and maintain real estate commission rates * * * in Montgomery County, Maryland * * *.
>
> * * * * *
>
> What must be proved beyond a reasonable doubt is that the alleged conspiracy was knowingly formed, and that two or more parties, including one or more of the Defendants * * * knowingly became members of the conspiracy which is charged in the indictment in this case.
>
> * * * * *

Petitioners argue, however, that even though they were shown to have knowingly entered into an agreement for the purpose of fixing prices, this instruction did not also require proof that they thereby intended to restrain trade (78-1737 Pet. 17-18; 78-1838 Pet. 5-8). Yet the court explicitly charged that, in order to convict, the jury must find that "the combination or conspiracy * * * had as its object unreasonable restraint of trade in Montgomery County" (J.A. 901-902).

In any event, petitioners' argument has been rejected by every court of appeals that has considered it.[10] This is a

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However, before you find that a Defendant became a member of the conspiracy charged, the evidence must show beyond a reasonable doubt that the conspiracy was knowingly formed and that the Defendant knowingly participated in the unlawful plan with the intent to further or advance some object or purpose of the conspiracy.

[10]See *e.g.*, *United States* v. *Gillen*, 599 F. 2d 541 (3d Cir. 1979), pet. for cert. pending, No. 79-58; *United States* v. *Continental Group, Inc.*, Nos. 78-2328, *et seq.* (3d Cir. July 20, 1979); *United States* v. *Brighton Building & Maintenance Co.*, No. 77-2295 (7th Cir. May 18, 1979), pets. for cert. pending, Nos. 78-1872 and 79-111.

To the extent that petitioners seek to rely on *Gypsum* in support of this contention (Pet. 17-18), that reliance is misplaced. In *Gypsum*, the Court struck down a jury instruction that allowed the jury to convict defendants of a Section 1 violation regardless of intent: so long as the result of defendants' information-exchange agreement was the stabilization of prices, the defendants were conclusively presumed to have intended to stabilize prices. The vice of this instruction, the Court emphasized, was that it did away with intent entirely and converted Section 1 into a strict liability offense. *United States* v. *United States Gypsum Co.*, *supra*, 438 U.S. at 446. The district court's instruction in this case sharply contrasts with that in *Gypsum*, for here the court permitted conviction only if the jury found from defendants' conduct that they knowingly entered into an agreement with the intent to fix prices. See, *e.g.*, J.A. 906, 910. Petitioners' suggestion that the instructions should have required proof not only that they intended to raise prices but also that they thereby intended to restrain trade is analogous to the argument rejected in *Gypsum* (438 U.S. at 446) that there must be proof that the conspirators desired "to violate the law." See also pages 10-11, *infra*.

price fixing case. For over 50 years the decisions of this Court in criminal and civil cases alike have made it clear that price fixing is *per se* illegal: that is, price fixing is so plainly anticompetitive that no elaborate inquiry need be made into the actual effects of the conspiracy or the possible beneficial motives of the defendants. See, *e.g.*, *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States* v. *Topco Associates*, 405 U.S. 596 (1972); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978); *United States* v. *United States Gypsum Co.*, *supra*, 438 U.S. at 440. Proof that petitioners intended to engage in price fixing establishes not only that they knew of the anticompetitive effects of their conduct, but also that they had the purpose of imposing such effects on the marketplace.[11] There is no need to open inquiry in every price fixing case into the probable effects of the conspiracy, for, as the Third Circuit explained in *United States* v. *Gillen*, *supra*, 599 F. 2d at 545, " '[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition.' Thus, the conscious object of every price-fixing conspiracy is an illegal act." Where defendants have acted with an intent to fix prices, "questions of knowledge of probable consequences and indeed of 'conscious object' appear clearly answered." *Id.* at 546.

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[11]As the court of appeals explained in *United States* v. *Brighton Building & Maintenance Co.*, *supra*, slip op. A-9, " '[s]ince the *per se* rules define types of restraints that are illegal without further inquiry into their competitive reasonableness, they are substantive rules of law, not evidentiary presumptions. It is as if the Sherman Act reads: 'An agreement among competitors to rig bids is illegal.' "

c. Petitioner Shannon & Luchs contends (79-93 Pet. 2) that it acted independently in raising its prices and that the jury might have found petitioner to be a member of the conspiracy solely because of this individual action. This claim is based on one sentence in the jury instructions which states that each defendant's knowing participation in the conspiracy could be proven by showing "a knowing assistance of any kind in effectuating the objective of the conspiracy" (J.A. 909).

The court of appeals correctly concluded that the jury instructions, read in their entirety, were proper (Pet. App. 22a). See *United States* v. *Park*, 421 U.S. 658 (1975). The district court charged the jury that the evidence must show beyond a reasonable doubt that the conspiracy was knowingly formed and that each defendant knowingly participated in it with the intent to further or advance some object or purpose of the conspiracy (J.A. 908-909). Then, as an example of what constitutes knowing participation in the conspiracy, the court stated that "knowing assistance of any kind in effectuating the objective of the conspiracy" (J.A. 909) would suffice. At the same time, however, the court emphasized the following:

> A Defendant may be found guilty of a conspiracy only if the Defendant understood that he had joined the single overall conspiracy that is charged. *If any Defendant was not a party to that overall agreement or conspiracy, you must find that Defendant not guilty even if he participated in isolated or subsidiary actions or events which aided the ends of the conspiracy.*

> Thus, if you find a Defendant engaged in particular acts of raising commission rates but that these were not part of the overall conspiracy, that is to say, were not pursuant to an agreement, you must find that Defendant not guilty.

J.A. 910 (emphasis supplied). These instructions were given after the judge had repeatedly told the jury that the government must show each defendant's participation in an unlawful agreement

> * * * as a matter of conscious choice on the part of each Defendant, beyond the [sic] reasonable doubt.
>
> It is not enough to show only that the parties acted uniformly or similarly or in ways that may seem to be mutually beneficial.
>
> If such actions were taken independently, as a matter of individual business judgment, without any agreement or arrangement or understanding among the parties, then there would be no conspiracy * * *.

J.A. 906. See also J.A. 903-005, 907-908, 913-915.

Viewed as a whole, the instructions thus plainly required the jury to find that each defendant participated in the conspiracy by agreeing to its unlawful ends and taking some further action toward achieving the common objectives.

CONCLUSION

The petitions for a writ of certiorari should be denied. The Court may wish to defer disposition of the petitions, however, pending the decision in *McLain* v. *Real Estate Board of New Orleans*, *supra*.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN H. SHENEFIELD
Assistant Attorney General

ROBERT B. NICHOLSON
MARGARET HALPERN
Attorneys

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